CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 30 AUGUST 21, 1996 NO. 34

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

Treasury Decisions

19 CFR Parts 10, 12, 102 and 134

(T.D. 96–48)

RIN 1515–AB34

RULES FOR DETERMINING THE COUNTRY OF ORIGIN OF A GOOD FOR PURPOSES OF ANNEX 311 OF THE NORTH AMERICAN FREE TRADE AGREEMENT; CORRECTIONS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule; corrections.

SUMMARY: This document makes corrections to the document published in the Federal Register which set forth final amendments to the Customs Regulations regarding the rules for determining when the country of origin of a good is one of the parties to the North American Free Trade Agreement (NAFTA) as required by Annex 311 of the NAFTA.

EFFECTIVE DATE: These corrections are effective August 5, 1996.

FOR FURTHER INFORMATION CONTACT: Sandra L. Gethers, Office of Regulations and Rulings (202–482–6980).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On June 6, 1996, Customs published in the Federal Register (61 FR 28932) as T.D. 96–48 a document which adopted as a final rule, with some modifications, interim amendments to the Customs Regulations that established the rules for determining when the country of origin of a good is one of the parties to the North American Free Trade Agreement (NAFTA) as required by Annex 311 of the NAFTA. Those final NAFTA Marking Rules apply only to all goods imported from Canada or Mexico other than textile and apparel products, and do not apply to trade with other countries. The June 6, 1996, notice provided for an August 5, 1996, effective date for the final regulations. A document correcting several errors in T.D. 96–48 was published in the Federal Register on July 1, 1996 (61 FR 33845).

This document corrects two additional errors published in T.D. 96–48.

One error involved the Discussion of Comments portion of the document under SUPPLEMENTARY INFORMATION. Specifically, the public comment discussion regarding the § 102.20 tariff shift rule for subheadings 8482.10–8482.80 (bearings) dealt with only one comment, which was opposed to the proposed tariff shift rule. However, that comment discussion failed to reflect that another comment, which was in favor of the proposed rule, was also received by Customs. This document corrects the comment discussion to more accurately reflect the totality of public comments received on this matter.

The second error involved the table under § 102.20 of the final regulatory texts. Specifically, the entry for HTSUS 8540.71–8540.99 reflected a typographical error in that the reference "8540.99" should have read "8540.89" in the "HTSUS" column and in the corresponding "Tariff shift and/or other requirements" column. This document sets forth the HTSUS entry in its entirety to correct this typographical error.

CORRECTIONS OF PUBLICATION

Accordingly, the document published in the Federal Register as T.D. 96–48 on June 6, 1996 (61 FR 28932) is corrected as set forth below.

Correction to the Discussion of Comments Section:

On page 28949, in the third column, the paragraphs under the heading *Subheadings 8482.10–8482.80 (Bearings)* are corrected to read as follows:

Comments:

The § 102.20 rule set forth in the May 5, 1995, notice of proposed rulemaking for subheadings 8482.10 through 8482.80 provides as follows:

> A change to subheading 8482.10 through 8482.80 from any other heading; or
>
> A change to subheading 8482.10 through 8482.80 from any other subheading, including another subheading within that group, except from inner or outer races or rings of subheading 8482.99.

Two comments were received on the proposed rule. The first commentor claimed that the processes of grinding, polishing and heat treating of rings and races should confer origin. The second commenter strongly supported the Customs proposal and provided arguments supporting its position that unfinished races or rings, which have the essential characteristics of the finished components, should determine the country of origin of the bearings, whether or not additional heat treatment or other finishing operations are performed on the races or rings.

Customs response:

Customs agrees with the second commenter. It remains the position of Customs that the operations described by the first commenter are merely finishing operations which do not confer origin. None of these

operations changes the essential character of the article which is processed. The name, character and use of the article remain the same after these operations are performed. *See National Hand Tool Corp. v. United States, supra,* wherein the court held that operations such as grinding, polishing and heat treating are merely finishing operations which do not constitute a substantial transformation. Therefore, the revision of the § 102.20 rule for these goods should be adopted as proposed.

Correction to the Final Regulations:

At the bottom of page 28975, the entry for HTSUS 8540.71–8540.99 is corrected to read as follows:

8540.71–8540.89 ..... A change to subheading 8540.71 through 8540.89 from any other subheading, including another subheading within that group.

Dated: August 6, 1996.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

[Published in the Federal Register, August 12, 1996 (61 FR 41737)]

(T.D. 96–60)

RECORDATION OF TRADE NAME: "OMI INDUSTRIES INC."

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of recordation.

SUMMARY: On April 3, 1996, a notice of application for the recordation under section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name "OMI INDUSTRIES INC.," was published in the Federal Register (61 FR 14851). The notice advised that before final action was taken on the application, consideration would be given to any relevant data, views, or arguments submitted in writing by any person in opposition to the recordation and received not later than June 3, 1996. No responses were received in opposition to the notice. Accordingly, as provided in section 133.14, Customs Regulations (19 CFR 133.14), the name "OMI INDUSTRIES INC.," is recorded as the trade name used by OMI Industries Inc., a corporation organized under the laws of the State of Ohio, located at 310 Outerbelt Street, Columbus, Ohio 43213.

The trade name is used in connection with aluminum and steel die cast products.

EFFECTIVE DATE: August 14, 1996.

FOR FURTHER INFORMATION CONTACT: Delois P. Johnson, Intellectual Property Rights Branch, 1301 Constitution Avenue, NW., (Franklin Court), Washington, D.C. 20229 (202–482–6960).

Dated: August 5, 1996.

JOHN F. ATWOOD,
Chief,
Intellectual Property Rights Branch.

[Published in the Federal Register, August 14, 1996 (61 FR 42313)]

(T.D. 96–61)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST FOR JULY 1996

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holiday: July 4, 1996.

Greece drachma:

July 1, 1996	$0.004171
July 2, 1996	.004170
July 3, 1996	.004182
July 4, 1996	.004182
July 5, 1996	.004160
July 6, 1996	.004160
July 7, 1996	.004160
July 8, 1996	.004160
July 9, 1996	.004173
July 10, 1996	.004168
July 11, 1996	.004186
July 12, 1996	.004178
July 13, 1996	.004178
July 14, 1996	.004178
July 15, 1996	.004182
July 16, 1996	.004240
July 17, 1996	.004239
July 18, 1996	.004250
July 19, 1996	.004245
July 20, 1996	.004245
July 21, 1996	.004245
July 22, 1996	.004250

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for July 1996 (continued):

Greece drachma (continued):

July 23, 1996	$0.004218
July 24, 1996	.004212
July 25, 1996	.004234
July 26, 1996	.004223
July 27, 1996	.004223
July 28, 1996	.004223
July 29, 1996	.004238
July 30, 1996	.004235
July 31, 1996	.004263

South Korea won:

July 1, 1996	$0.001235
July 2, 1996	.001230
July 3, 1996	.001241
July 4, 1996	.001241
July 5, 1996	.001229
July 6, 1996	.001229
July 7, 1996	.001229
July 8, 1996	.001228
July 9, 1996	.001234
July 10, 1996	.001233
July 11, 1996	.001231
July 12, 1996	.001229
July 13, 1996	.001229
July 14, 1996	.001229
July 15, 1996	.001229
July 16, 1996	.001229
July 17, 1996	.001229
July 18, 1996	.001228
July 19, 1996	.001228
July 20, 1996	.001228
July 21, 1996	.001228
July 22, 1996	.001229
July 23, 1996	.001230
July 24, 1996	.001228
July 25, 1996	.001229
July 26, 1996	.001228

Taiwan N.T. dollar:

July 1, 1996	$0.036311
July 2, 1996	.036350
July 3, 1996	.036258
July 4, 1996	.036258
July 5, 1996	.036271
July 6, 1996	.036271
July 7, 1996	.036271
July 8, 1996	.036127
July 9, 1996	.036298
July 10, 1996	.036232
July 11, 1996	.036219
July 12, 1996	.036284
July 13, 1996	.036284
July 14, 1996	.036284
July 15, 1996	.036166
July 16, 1996	.036271
July 17, 1996	.036258

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for July 1996 (continued):

Taiwan N.T. dollar (continued):

July 18, 1996	$0.036245
July 19, 1996	.036284
July 20, 1996	.036284
July 21, 1996	.036284
July 22, 1996	.036284
July 23, 1996	.036271
July 24, 1996	.036284
July 25, 1996	.036350
July 26, 1996	.036166
July 27, 1996	.036166
July 28, 1996	.036166
July 29, 1996	.036298
July 30, 1996	.036337
July 31, 1996	.036324

Dated: August 1, 1996.

FRANK CANTONE,
Chief,
Customs Information Exchange.

(NOTE: There were no variances from the quarterly rate for July 1996.)

U.S. Customs Service

General Notices

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, August 7, 1996.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

MODIFICATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF INDUSTRIAL BELTING

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of tariff classification ruling letters.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying certain rulings pertaining to the tariff classification of certain food supplements. Notice of the proposed modification was published July 3, 1996, in the CUSTOMS BULLETIN, Volume 30, Number 27.

EFFECTIVE DATE: This decision is effective for merchandise entered or withdrawn from warehouse, for consumption on or after October 21, 1996.

FOR FURTHER INFORMATION CONTACT: Arnold L. Sarasky, Food and Chemicals Classification Branch, Office of Regulations and Rulings (202) 482–7020.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On July 3, 1996, Customs published a notice in the CUSTOMS BULLETIN, Volume 30, Number 27, proposing to modify Headquarters Ruling

Letter (HRL) 084763, issued September 9, 1989, which Customs Headquarters held that certain industrial belting was classifiable under subheading 3917.32.0050, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). No comments were received concerning the matter.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1), as amended by section 623 of Title VI (Customs Modernization of the North American Free Trade Agreement Implementation Act, (Pub. L. 103–182, 107 Stat. 2057), this notice advises interest parties that Customs is modifying HRL 084763 to reflect the proper classification of the PU 0/6 belting covered by that ruling in subheading 3926.90.9890, HTSUSA, which provides for other articles of plastics, other. Merchandise so classified is subject to a general rate of duty of 5.3 percent *ad valorem*. HRL 959318 modifying HRL 084763 is set forth in an attachment to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: August 5, 1996.

JOHN B. ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, August 5, 1996.

CLA–2 RR:TC:FC 959318 ALS
Category: Classification
Tariff No. 3926.90.9890

MR. GENE HOBSON
BELTING INDUSTRIES CO., INC.
20 Boright Ave.
Kenilworth, NJ 07033

Re: Headquarters Ruling Letter (HRL) 084763, dated September 9, 1989, concerning certain industrial belting.

DEAR MR. HOBSON:

In HRL 084763 you were advised that certain industrial belting of polyurethane, not having any fabric woven in it and referred to as PU 0/6, was classifiable in subheading 3917.32.0050, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). We noted that that ruling was based on the premise as to the use of the belting. Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993) (hereinafter section 625), notice of the proposed modification of HRL 084763 was published July 3, 1996, in the CUSTOMS BULLETIN, Volume 30, Number 27.

Facts:

The article under consideration is industrial belting of polyurethane without any fabric woven into it. The belting comes in a variety of lengths and widths with a thickness of less than 3 mm. The belting is imported in the form of sleeves (tubes).

Issue:

What is the classification of industrial belting made solely of polyurethane and imported in the form of sleeves?

Law and Analysis:

Classification of merchandise under the HTSUSA is governed by the General Rules of Interpretation (GRI's) taken in order. GRI 1 provides that the classification is determined first in accordance with the terms of the headings and any relative section and chapter notes. If GRI 1 fails to classify the goods and if the headings and legal notes do not otherwise require, the remaining GRI's are applied, taken in order.

HRL 084763 held that the subject articles were classifiable under subheading 3917.32.0050, HTSUSA, (now 3917.32.600, HTSUSA) the provision for other tubes, pipes, hoses, not reinforced, other, of plastics. In considering the propriety of that classification we considered the definition for the expression *"tubes, pipes and hoses"* contained in Legal note 8 to Chapter 39, HTSUSA. That definition provides, in pertinent part:

> For the purposes of heading 3917, the expression *"tubes, pipes and hoses"* means hollow products, whether semimanufactures or finished products of a kind generally used for conveying, conducting or distributing gases or liquids.

We have noted that the instant product, PU 0/6, while being imported in sleeve or tubular form, is not a tube as that term is defined in the referenced legal note. The product is not a tube of the type generally used for conveying, conducting or distributing gases or liquids. Accordingly, it is not classifiable under the provisions for tubes, pipes and hoses of plastics.

Holding:

Industrial belting (PU 0/6) consisting of only polyurethane and not having any fabric woven into it which is imported in the form of sleeves (tubing), but is not capable of conveying, conducting or distributing gases or liquids, is classifiable in the provision for other articles of plastics, other, in subheading 3926.90.9890, HTSUSA. Merchandise so classifiable is subject to a general rate of duty of 5.3 percent *ad valorem*.

HRL 084763, dated September 9, 1989, is hereby modified as to PU 0/6 belting. In accordance with section 625, this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decision pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

JOHN B. ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

U.S. Court of Appeals for the Federal Circuit

RICO IMPORT CO., PLAINTIFF-APPELLANT *v.*
UNITED STATES, DEFENDANT-APPELLEE

Appeal No. 93–1321

(Decided December 20, 1993)

Edward Glad, Glad & Gerguson, of Pasadena, California, submitted for plaintiff-appellant.

Edith Sanchez Shea, Attorney, Commercial Litigation Branch, Department of Justice, of New York, New York, submitted for defendant-appellee. With her on the brief were *Frank W. Hunger,* Assistant Attorney General, *David M. Cohen,* Director and *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office.

Appealed from: U.S. Court of International Trade.
Judge CARMAN.

Before PLAGER and SCHALL, *Circuit Judges,* and PRATT*, *Senior Circuit Judge.*

PLAGER, *Circuit Judge.*

Rico Import Company appeals a decision[1] of the Court of International Trade affirming a classification of goods under the Harmonized Tariff Schedule of the United States by the Customs Service. We *reverse* the decision of the Court of International Trade.

A

BACKGROUND AND PROCEDURAL HISTORY

Rico Import Company (Rico) imports tubes from France into the United States for the production of the "reed" used in clarinets and saxophones. Rico produces these tubes from the "giant reed," *Arundo donax,* which grows to a length of 18–24 feet. The reeds are harvested during the winter, when the plant is dormant. In their state as harvested, the reeds are dried for four to six months. While drying, the reeds are kept well ventilated but out of direct sunlight. After the first drying

* Honorable George C. Pratt, U.S. Court of Appeals for the Second Circuit, sitting by designation.

[1] We note that Rico Import Company has challenged the classification of goods made from *Arundo donax* before. *See Rico Import Co. v. United States,* 469 F.2d 699 (CCPA 1972). The law has changed, and *res judicata* is not an issue.

process, the leaves, stems, and husks are removed from the poles. The bare poles are then cut into 6–8 foot lengths. The poles are further cured in the sun for up to two weeks. The cured poles are cut again, removing the nodes that divide the plant's stem into sections. The resulting tubes are sorted into two sizes: one less than 24 mm in diameter and the other from 24 to 27 mm in diameter. The tubes are sorted by wall thickness as well as by diameter. In this condition, the tubes are imported to make "reeds" for musical instruments. The smaller tubes are used for clarinets, the larger ones for saxophones.

Arundo donax may also be plaited and used to make cane furniture, in conjunction with chain link fencing to make opaque barriers, to make light and disposable roofs for construction sites, and so forth. The *Arundo donax* tubes imported by Rico are not suitable for plaiting, and are used solely for the production of reeds for musical instruments.

The Customs Service (Customs) originally maintained that Rico's tubes were properly classified under subheading 4602.10.50 of the Harmonized Tariff Schedule of the U.S. (1990) (HTSUS).[2] A tariff of 3.0% *ad valorem* is applied to goods entering the United States covered by subheading 4602.10.50, HTSUS. Before the Court of International Trade (CIT), Rico protested the classification of its goods under subheading 4602.10.50, HTSUS, and argued that subheading 1404.90.00, HTSUS should have been applied to its tubes instead. Customs countered that *Arundo donax* was specifically covered by subheading 1401.90.40, HTSUS. The CIT found that Customs had abandoned its original contention that the tubes were dutiable under 4602.10.50, HTSUS. *Rico Import Co. v. United States,* 797 F. Supp. 1028, 1029 (CIT 1992).

In pertinent part, the Harmonized Tariff Schedule provides:

CHAPTER 14

VEGETABLE PLAITING MATERIALS; VEGETABLE PRODUCTS NOT ELSEWHERE SPECIFIED OR INCLUDED

Heading/ Subheading	*Article Description*	*Rate of Duty*
1401	Vegetable materials of a kind used primarily for plaiting (for example, bamboos, rattans, reeds, rushes, osier, raffia, cleaned, bleached, or dyed cereal straw and lime bark):	
1401.90	Other	
1401.90.40	Other	5%[2]
9903.10.19	Other vegetable materials of a kind used primarily for plaiting (provided for in subheading 1401.90.40)	3.8%
*	* * * * * *	*
1404	Vegetable products not elsewhere specified or included:	
1404.90.00	Other	Free

[2] See heading 9903.10.19

[2] In all respects pertinent to this opinion, the Harmonized Tariff Schedule for 1993 is identical to that of 1990.

As there was no dispute over any material fact, the CIT decided the case on a motion for summary judgment. The CIT held that Subheading 1401.90.40, HTSUS applied to the *Arundo donax* tubes imported by Rico. Rico appeals to this court.

B

Standard of Review

The CIT recognized that "[s]ummary judgment is properly granted only where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law." *Rico Import Co. v. United States,* 797 F. Supp. 1028, 1029 (CIT 1992), (citing *Mingus Constructors, Inc. v. United States,* 812 F.2d. 1387, 1390 (Fed. Cir. 1987)). This case turns on a question of interpretation of the classifications established by the Tariff Schedule. This court has held such interpretation to be a question of law, and therefore reviewed by this court without deference to the trial forum. *Digital Equip. Corp. v. United States,* 889 F.2d 267, 268 (Fed. Cir. 1989).

C

Analysis

Heading 1401, HTSUS applies to "vegetable materials of a kind used primarily for plaiting (for example, bamboos, rattans, reeds, rushes, osier raffia, cleaned, bleached or dyed cereal straw and lime bark)." Subheading 1401.90.40, HTSUS incorporates by reference subheading 9903.10.19, HTSUS, which imposes a 3.8% tariff on "other vegetable materials of a kind used primarily for plaiting." The question is thus whether the *Arundo donax* tubes imported by Rico are "of a kind used primarily for plaiting."

The goods at issue are defined by stipulation. As imported, the tubes are vegetable products intended for use in the manufacture of musical instruments, specifically as reeds in the mouthpieces of clarinets and saxophones. The parties have stipulated that the tubes are in fact used for nothing else. The parties have further stipulated that, in their condition as imported, the tubes are unsuitable for plaiting.

The assertion of Customs that the reeds even as imported *might* be split, and would then be suitable for plaiting, strikes us as an overbroad basis for a tariff. "The dutiable classification of articles imported must be ascertained by an examination of the imported article itself, in the condition in which it is imported." *Worthington v. Robbins,* 139 U.S. 337, 341 (1891). Under the rationale proferred by Customs, all flammable materials entering the U.S. might be dutiable as fuel. Congress did not pass a law with the specificity of the Harmonized Tariff Schedule in order to encourage the taxation of fictional uses of imported products. The tubes are not suitable for plaiting, and are not in fact plaited. Rico imports tubes used to make musical instruments, not plaiting materi-

als. The obvious conclusion is that the plain language of subheading 1401.90.40, HTSUS excludes Rico's goods.

CONCLUSION

The judgment of the CIT is reversed.

REVERSED

CONOCO, INC., CITGO PETROLEUM CORP., LAKE CHARLES HARBOR, AND TERMINAL DISTRICT, PLAINTIFFS-APPELLANTS *v.* UNITED STATES FOREIGN-TRADE ZONES BOARD, BARBARA H. FRANKLIN, SECRETARY OF COMMERCE, AS CHAIRMAN AND EXECUTIVE OFFICER OF THE FOREIGN-TRADE ZONES BOARD, NICHOLAS F. BRADY, SECRETARY OF THE DEPARTMENT OF THE TREASURY, AS MEMBER OF THE FOREIGN-TRADE ZONES BOARD, MICHAEL P. W. STONE, SECRETARY OF THE ARMY, AS A MEMBER OF THE FOREIGN-TRADE ZONES BOARD, AND JOHN J. DA PONTE, JR., EXECUTIVE SECRETARY OF THE FOREIGN-TRADE ZONES BOARD, DEFENDANTS-APPELLEES

Appeal No. 92–1396

(Decided March 15, 1994)

William F. DeMarest, Jr., Holland & Hart, of Washington, D.C., argued for plaintiffs-appellants. With him on the brief was *Adelia S. Borrasea.* Also on the brief was *Charles M. Floren,* CITGO Petroleum Corporation, of Tulsa, Oklahoma.

Mark S. Sochaczewsky, Attorney, Commercial Litigation Branch, Department of Justice, of New York, New York, argued for defendants-appellees. With him on the brief were *Stuart M. Gerson,* Assistant Attorney General, *David M. Cohen,* Director and *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office.

John G. Kester and *David D. Aufhauser,* Williams & Connolly, of Washington, D.C., were on the brief for Amicus Curiae, Phibro Energy, Inc. and Phibro Energy USA, Inc.

Appealed from: U.S. Court of International Trade.
Judge CARMAN.

Before RICH and PLAGER, *Circuit Judges,* and COHN, *District Judge.*[*]

PLAGER, *Circuit Judge.*

In this case we are called upon to determine what court, if any, has jurisdiction to review certain orders of the Foreign Trade Zones Board (Board or FTZB), an agency of the federal government.[1] Appellants appeal the April 7, 1992 judgment of the Court of International Trade, Court No. 90–06–00289, dismissing for lack of jurisdiction this action—a challenge to the Board's imposition of conditions on the grant of for-

[*] Honorable Avern Cohn, District Judge for the Eastern District of Michigan, sitting by designation.

[1] The Board is a governmental entity which has the authority to grant to corporations the privilege of establishing, operating, and maintaining a foreign trade zone in the United States. *See* 19 U.S.C. § 81b(a) (1988).

eign subzone status to refineries operated by the two private appellants, Conoco, Inc. (Conoco) and CITGO Petroleum Corp. (Citgo). *Conoco, Inc. v. United States Foreign Trade-Zones Bd.*, 790 F. Supp. 279 (Ct. Int'l Trade 1992). We *reverse* and *remand*.

I. BACKGROUND

There are three appellants in this action—two private and one public. The two private appellants are Conoco and Citgo. The one public appellant is the Lake Charles Harbor and Terminal District (District). The Board has authorized the District to establish, operate and maintain a foreign trade zone[2] adjacent to or in Lake Charles Harbor, a port of entry into United States customs territory. Conoco and Citgo are the owners of oil refineries located outside the zone. During 1986–87, the District filed applications on their behalf with the Board asking that these refineries be granted subzone status.[3] The Board granted these applications subject to the following conditions:

> (1) that duties be paid on foreign crude oil used as fuel (or refined into products used as fuel) in the refineries; and
> (2) that Conoco and Citgo elect "privileged foreign status" for foreign crude oil brought into their respective subzones, *i.e.*, elect to pay duties on the value of that crude oil as opposed to the value of refined products produced therefrom.[4]

It is the imposition of these conditions on the grant of subzone status that lies at the heart of this case. Pursuant to the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.* (1988), two of the appellants, Conoco and the District, challenged in the United States District Court for the Western District of Louisiana, Lake Charles Division, the Board's imposition of these conditions.[5] The government responded that, under the law, exclusive jurisdiction lay in the Court of International Trade, and moved to dismiss the action for lack of subject matter jurisdiction in the district court. In a judgment dated June 25, 1990, Civil Action No. 89–1717–LC, the district court, pursuant to the government's motion, dismissed the action.

All three appellants then filed their action in the Court of International Trade in New York. When they subsequently filed a motion for

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[2] A foreign trade zone is a geographical area located adjacent to or in a port of entry into the United States. *See* 19 U.S.C. § 81b (1988). The grantee of a zone—District here—has the authority to permit others to operate within the zone subject to the approval of the Board. *See* 19 U.S.C. § 81m (1988). A company operating within the zone can import foreign merchandise into the zone and manufacture finished merchandise therefrom. *See* 19 U.S.C. § 81c (1988). It can elect whether to pay duties on the foreign merchandise when it is imported into the zone, or on the finished merchandise when it is imported into U.S. customs territory for domestic consumption. The company can thus take advantage of any favorable differential between the rate of duty for the foreign merchandise and that for the finished merchandise. *See Armco Steel Corp. v. Stans*, 431 F.2d 779, 782 (2d Cir. 1970).

[3] A subzone has all the characteristics of a zone except that it is an area separate from an existing zone. *See* 15 C.F.R. § 400.304 (1991). It can only be created when a company cannot be accommodated within the zone. *Id.* Only the grantee of the zone can apply for subzone status. *See* 15 C.F.R. § 400.106 (1991). That is why the District applied for subzone status on behalf of Conoco and Citgo.

[4] A third condition, immaterial for purposes of this appeal, was imposed and subsequently revoked by the Board on March 27, 1991.

[5] On the merits, appellants claim that the Board's action is arbitrary and capricious in view of the Board's failure to impose these conditions in like circumstances in five instances prior to March of 1988. Appellants also claim that the Board's action is inconsistent with their right to elect whether to pay duties on foreign crude or on refined products produced therefrom.

judgment upon the agency record[6], the government filed a cross-motion to dismiss for lack of subject matter jurisdiction. In support of its motion, the government argued that no court had jurisdiction to review the action of the Board. The government pointed to the fact that Congress, in the Foreign Trade Zones Act of 1934 (FTZA) (codified as amended at 19 U.S.C. § 81a *et seq.* (1988)), made specific provision for the review of zone or subzone grant revocations[7], but failed to provide for review of other Board actions, such as those involved here. This, according to the government, evidenced Congress' intent that there not be judicial review of these other actions.

In the alternative, the government argued that neither of the possible jurisdictional paths otherwise applicable for Court of International Trade review, subsections (a) and (i) of 28 U.S.C. § 1581 (1988), were available. These two subsections read:

> (a) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930 [codified as amended at 19 U.S.C. § 1515 (1988)].
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> * * * * * * *
>
> (i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)–(h) of this section * * *, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—
>
> (1) revenue from imports or tonnage;
>
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
>
> (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
>
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section * * *.

Under subsection (a), according to the government, the action was premature because Conoco and Citgo had not pursued the protest procedure through Customs. This procedure would require Conoco and Citgo to activate their respective subzones, import foreign crude oil therein, have Customs assess duties on that oil, pay those duties, file a protest with Customs, and then await the decision of Customs to deny the protest—all before filing suit to challenge the conditions the Board imposed on the grant of the subzone. Under subsection (i), according to the government, the action was barred because appellants had not met the threshold requirement of showing that the protest procedure and subse-

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[6] Pursuant to Rule 56.1 of the Rules of the Court of International Trade.

[7] *See* 19 U.S.C. § 81r(c).

quent review provided by subsection (a) would be "manifestly inadequate."[8]

In a judgment dated April 7, 1992, the court denied appellants' motion and granted the government's motion. The court castigated the government for playing "jurisdictional ping-pong" but concluded nonetheless that the action was premature under subsection (a) and barred under subsection (i). It did not reach the alternative argument—that no court had jurisdiction to review the action. This appeal followed.

II. DISCUSSION

A

We first address the question of whether any court has jurisdiction to review these actions of the Board. Before the Court of International Trade, the government maintained that no provision of the Foreign-Trade Zones Act (FTZA), 19 U.S.C. § 81a-u (1988), makes Board determinations to either *grant* foreign-trade zones or *attach conditions* to such grants subject to judicial review. According to the government, judicial review is available only in cases involving the *revocation* of foreign-trade zone grants pursuant to subsection 81r of the statute.[9]

On appeal to this court, the government argues that, since the Court of International Trade did not make any express determination on this issue, we need not reach it. But the court's decision was premised on the conclusion that invocation of its jurisdiction was premature, not that it was nonexistent. Further, and more to the point, the government's effort to avoid the issue might have some force if we agreed with the court's interpretation of the statutory provisions which, according to the court, require appellants to engage in certain additional administrative activity before they can invoke the court's jurisdiction. Since we do not agree, and believe that, if appellants' claims are reviewable at all, they are ripe for decision, we must determine if the agency actions objected to by appellants are subject to that review.

At oral argument, the question of whether there was judicial review of the matter at issue was the subject of discussion between court and counsel. Eventually the following colloquy ensued between counsel for the government and members of the court:

> *Government Counsel (GC):* Well, the original determination of the district court was that you go to the CIT [Court of International Trade]. The CIT implicitly assumed that that was correct.
>
> *The Court:* Do you think that's correct?

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[8] This threshold requirement does not appear in the statute, but finds expression in certain of our precedents. *See, e.g., Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987), *cert. denied*, 484 U.S. 1041 (1988). It may have a basis in the prefatory "[i]n addition to" language of subsection (i). *See United States v. Uniroyal, Inc.*, 687 F.2d 467, 475 (CCPA 1982) (Nies, J., concurring). It presumably serves the purpose of carrying out Congress' intent that subsection (i) be a "residual" grant of jurisdiction, and not be used to routinely bypass the "traditional method" of obtaining judicial review of international trade disputes involving Customs—filing a protest and then seeking judicial review if Customs denies the protest. H.R. Rep. No. 1235, 96th Cong., 2d Sess. 47 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3758.

[9] As *Amici Curiae Phibro Energy* noted, the same contention has been made in its case, also on appeal to this court, and involving the same issue. *See Phibro Energy, Inc. v. Barbara H. Franklin*, No. 92-06-00394, 1993 Ct. Intl. Trade LEXIS 72, at *6 (Ct. Int'l Trade May 21, 1993), *appeal docketed*, No. 93-1389 (Fed. Cir. June 4, 1993); *see also* Brief for Defendants (Government) at 2, *id.* That appeal has been stayed pending decision in *Conoco*. No. 93-1389 (Fed. Cir. July 12, 1993).

GC: It's a very confusing area, as you can understand.

Court: Yes, all right. What's the government's position? What is the correct answer? You're the government. What is the correct answer.

GC: The government's position as stated in this case is that, the trial court's determination that, the underlying purposes and the underlying determination which is reviewed by the Customs Service can be reviewed by the CIT, can in fact be reviewed by the CIT.

Although counsel's response was somewhat confusing—it referred to determinations reviewed by the Customs Service, when the question here is a determination of the FTZB—it could be read as a concession that jurisdiction in this class of case properly lies in the Court of International Trade.[10] We are not prepared to rest on that, however, particularly since counsel subsequently further qualified his statement by saying that, "I can only speak, as your Honor probably recognizes, for the government in this case." Accordingly, we address the question independently of the government's posture at argument.

The statute, 19 U.S.C. § 81, which contains the provisions establishing the Board and detailing its mission and authority, contains a subsection, 81r, dealing with Board orders that revoke previously granted zones. The subsection provides that an order revoking a grant is final and conclusive unless the grantee appeals within 90 days "to the court of appeals for the circuit in which the zone is located * * *."

This is the only statement in the statute of Congressional intent regarding judicial review of Board orders. The statute leaves unsaid what is to be done with orders of the Board other than orders of revocation. The most that can be said for the statute is that, if these other orders are judicially reviewable, jurisdiction-granting authority must be located in other legislation. The least that can be said for the statute is that it falls far short of a clear declaration of Congressional intent regarding reviewability of these other orders.

It is well established that judicial review of agency action is to be presumed, absent clear and convincing evidence of Congressional intent to the contrary. *See, e.g., Traynor v. Turnage,* 485 U.S. 535, 542 (1988) (citing *Bowen v. Michigan Academy of Family Physicians,* 476 U.S. 667, 670 (1986) and *Abbott Lab. v. Gardner,* 387 U.S. 136, 141 (1967)). The language, or absence of it, in this statute regarding judicial review cannot constitute the clear and convincing evidence required to bar such review. *See Abbott Lab.,* 387 U.S. at 141 (the mere fact that a statute provides for review of certain enumerated actions is insufficient evidence of congressional intent to foreclose review of other actions). The fact that a particular review route was specified for revocations is not inconsistent with this conclusion. As we explain below, the two judicial candidates for jurisdiction to review these other orders are the district courts, under their general APA jurisdiction, and the Court of International Trade, under its exclusive jurisdiction over civil actions relating to customs and

[10] It is also possible that counsel was obfuscating his answer by referring to judicial review of Custom's decisions under subsection (a), about which there was never any question.

tariffs. In either case, the review would begin at the trial level, and not reach a court of appeals until sometime later. Congress may well have simply intended that revocation orders, because of their impact on already established rights of the parties, be reviewed by direct appeal to the appropriate courts of appeal. In any event, we have no difficulty in holding that the orders of the FTZB, absent a clear and unequivocal expression of Congressional intent to the contrary, are generally subject to judicial review in accordance with established principles of law.[11] We turn then to the question of where that review lies.

B

If jurisdiction lies in district courts for review of these orders, it must lie there because of the general grant of jurisdiction over agency determinations contained in § 10(c) of the APA, 60 Stat. 243 (1946) (codified as amended at 5 U.S.C. § 704 (1988)). If it lies in the Court of International Trade, it is because of the exclusive grant to the Court of International Trade of jurisdiction over various trade and tariff matters contained in 28 U.S.C. § 1581. When Congress amended 28 U.S.C. § 1581 to add subsection (i) in 1980, it reiterated its purpose to grant the Court of International Trade broad exclusive jurisdiction "over any civil action against the United States arising out of the federal statutes governing import transactions." H.R. Rep. No. 1235, at 21, *reprinted in* 1980 U.S.C.C.A.N. at 3732. Congress wanted to "eliminate the confusion which currently exists as to the demarcation between the jurisdiction of the district courts and the Court of International Trade." H.R. Rep. No. 1235, at 47, *reprinted in* 1980 U.S.C.C.A.N. at 3759. And it wanted to "eliminate much of the difficulty experienced by international trade litigants who in the past commenced suits in the district courts only to have those suits dismissed for want of subject matter jurisdiction," as well as to "ensure that these suits will be heard on the merits." *Id.*

It is thus apparent from the legislative history of § 1581 and from the broad grant of exclusive jurisdiction given to the Court of International Trade that Congress had in mind consolidating this area of administrative law in one place, and giving to the Court of International Trade, with an already developed expertise in international trade and tariff matters, the opportunity to bring to it a degree of uniformity and consistency. Obviously that would not be possible if jurisdiction were spread among the district courts throughout the land.

We conclude then that, consistent with Congress' intent, if jurisdiction can be found to lie under the provisions of § 1581, such jurisdiction would place exclusive judicial review of the issues raised by appellants in the Court of International Trade.[12] Only if no jurisdictional grant can be

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[11] We likewise reject the government's argument that the Board's action is subject to limited review, i.e., that it can only be reviewed for procedural correctness. For authority, the government relies on *Florsheim Shoe Co., Division of Interco, Inc. v. United States*, 744 F.2d 787 (Fed. Cir. 1984) and *West Bend Co., Division of Dart Industries v. United States*, 576 F. Supp 630 (Ct. Int'l Trade 1983). However, these cases involve challenges to actions by the President which are entitled to great deference by the judiciary. Actions by the Board are not entitled to the same degree of deference.

[12] *See K Mart v. Cartier, Inc.*, 485 U.S. 176, 182–83 (1988)("The District Court would be divested of jurisdiction * * * if this action fell within one of several specific grants of exclusive jurisdiction to the Court of International Trade.").

found in the Court of International Trade would it be appropriate to invoke the general administrative review function of the district courts in such cases.

C

There are two subsections of § 1581 which plausibly give appellants a route for judicial review by the Court of International Trade of the issues they wish to raise. The first, subsection (a), provides for review of a denial by the Customs Service of a protest over a specific tariff. As we noted earlier, this would require the private appellants to activate their zones and go through the steps leading up to such a protest denial.[13] This is the route the government urges as the only one, if any, open to appellants, and it is appellants' failure to follow that route that led the Court of International Trade to declare their appeal premature.

Appellants argue that subsection (a) cannot apply here because Customs does not have the power or authority to overturn an action by the Board, a separate agency.[14] Moreover, argue appellants, the Court of International Trade, on appeal from Custom's denial of a protest, would likewise not be able to overturn this action by the Board both because the Board would not be a party to the appeal, and because the record supporting the Board's action would not be before the Court of International Trade.

The government responds that the statute, 19 U.S.C. § 1514(a) (1988), that governs Customs' review of protest matters indicates Customs does have authority to effectively review actions by the Board in a protest proceeding. The language the government points to refers to matters subject to review in a protest, and states that the review "includ[es] the legality of all orders and findings entering into the same."[15] But that language is cabined within a statute relating to customs duties and tariffs, and is further qualified by the provision referring to charges or exactions "within the jurisdiction of the Secretary of the Treasury."[16] The Treasury Act cannot fairly be read to authorize Customs to review actions of a separate board, not under the jurisdiction of Treasury, in making a grant of a subzone or in imposing condi-

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[13] Sometime after this suit was filed in the CIT, Citgo activated its zone, and has since filed a tariff protest with the Customs Service. As explained, that route does not provide an adequate vehicle for the APA-type review being sought here of the Board's conditions, and thus Citgo's actions are immaterial to this suit.

[14] Customs is part of the Treasury Department, while the Board is a separate executive agency consisting of the Secretary of Commerce, the Secretary of the Treasury, and the Secretary of the Army. *See* 19 U.S.C. § 81a(b) (1988). The Secretary of Commerce functions as the chairman and executive officer of the Board. *Id.*

[15] That section reads in relevant part:

> [D]ecisions of the appropriate customs officer, *including the legality of all orders and findings entering into the same*, as to—
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> * * * * * * *
>
> (3) *all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury* * * *
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> * * * * * * *
>
> shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade in accordance with chapter 169 of title 28 within the time prescribed by section 2636 of that title * * *. (Emphasis added).

[16] That phrase appeared for the first time in § 514 of the Treasury Act of 1922, 42 Stat. 969 (1922), a predecessor to 19 U.S.C. § 1514(a). It did not appear in the House bill, but was subsequently added without comment in the associated reports. Accordingly, we take it to have its normal meaning: issues within the power or authority of Treasury to decide.

tions on a grant. We conclude, then, that subsection (a) is not intended to provide an effective jurisdictional vehicle for these appellants to bring their issues before the court.[17]

This conclusion is fully supported by *Luggage and Leather Goods Manufacturers of America v. United States*, 588 F. Supp. 1413 (Ct. Int'l Trade 1984) and *United States Cane Sugar Refiners' Association v. Block*, 544 F. Supp. 883, 887 (Ct. Int'l Trade 1982), *aff'd*, 683 F.2d 399, 402 n. 5 (CCPA 1982). In *Luggage and Leather Goods Manufacturers*, a domestic trade association and a labor union challenged the legality of a presidential order designating certain categories of articles as eligible for duty-free treatment. The Court of International Trade held that it could exercise jurisdiction under subsection (i), notwithstanding the potential availability of subsection (b) of 35 U.S.C. § 1581[18] and plaintiffs' failure to exhaust before filing suit the protest procedure referred to in that subsection, because the presidential order was "a matter outside the authority of the Customs Service." *Id.* at 1420–21. Pursuit of a remedy through that procedure would have been "futile and inappropriate." *Id.* at 1421.

In *United States Cane Sugar Refiners' Association*, an association of sugar refiners challenged a presidential proclamation imposing import quotas on sugar. The Court of International Trade held that it could exercise jurisdiction under subsection (i), notwithstanding the potential availability of subsection (a) and the association's failure to exhaust before filing suit the protest procedure referred to in that subsection, because "[the] Customs officials [in the context of such a procedure] obviously have no authority to override the presidential proclamation and admit over-quota sugar." *Id.* at 887. Again, pursuit of a remedy through that procedure would have been "inequitable and an insistence of a useless formality." *Id.* On appeal, our predecessor court affirmed, although on a different ground—that members of the association would have been irreparably harmed if required to exhaust that procedure before filing suit.

The legislative history of subsection (a) is in accord. When Congress added subsection (i) to the statute in 1980, it amended subsection (a) to eliminate the language "legality of all orders and findings" appearing in the predecessor of that statute.[19] Congress dropped this language after concern was expressed that its retention would allow a litigant, in the

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[17] *Accord K Mart Corp. v. Cartier, Inc.*, 485 U.S. 176, 190–91 (1988): "The 'protest' referred to in subsection (a) is an administrative remedy available to challenge specified decisions by Customs officers * * *. Petitioner acknowledges that the present action is not a protest * * *."

[18] Subsection (b) reads:

> (b) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516 of the Tariff Act of 1930 [codified as amended at 19 U.S.C. § 1516 (1988)].

Section 516 of the Tariff Act of 1930, codified as amended, 19 U.S.C. § 1516 (1988), provides to a domestic competitor, not directly involved in the specific import transaction, the right to initiate a protest proceeding with Customs with respect to that transaction.

[19] The immediate predecessor of that statute, Pub. L. 91–271, 84 Stat. 278 (1970) (codified as 28 U.S.C. § 1582(a) (1970)), read in relevant part:

> The Customs Court shall have exclusive jurisdiction of civil actions instituted by any person whose protest pursuant to the Tariff Act of 1930, as amended, has been denied, in whole or in part, by the appropriate customs officer, where the administrative decision, *including the legality of all orders and findings entering into the same*, involves * * * (3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury * * *. (Emphasis added).

situation in which Customs has acted on behalf of another agency, to mount two attacks on the decision by that other agency. The litigant could first mount a direct attack, and if unsuccessful, mount a "collateral attack" under subsection (a). *Hearings Before the Subcomm. on Monopolies and Commercial Law of the Comm. on the Judiciary,* 96th Cong., 1st Sess. 304–305 (1980); *Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Comm. on the Judiciary,* 96th Cong., 1st Sess. 23–24 (1979). Congress, by eliminating this language, apparently did not want subsection (a) to be used as a mechanism to mount collateral attacks on other agency decisions.

As noted earlier, the other subsection (subsection (i)) of § 1581 was intended to give the Court of International Trade broad residual authority over civil actions arising out of federal statutes governing import transactions, and to eliminate the confusion over whether jurisdiction lay in the Court of International Trade or the district courts. On its face, subsection (i) is straightforward and comprehensive. The language of subsection (i) granting to the Court of International Trade "exclusive jurisdiction of any civil action * * * that arises out of any law of the United States providing for—," when coupled with the phrases in paragraph (i)(1) relating to "revenue from imports or tonnage" would seem easily to embrace the matters appellants raise here. The foreign-trade zones arise under laws designed to deal with revenue from imports, and they provide a special mechanism for determining revenue from materials imported into these zones.

In addition, paragraph (i)(4) refers to "administration and enforcement" with respect to the matters referred to in the earlier paragraphs, as well as those covered in subsections (a) through (h). Again, a straightforward reading of the statutory language indicates that the kinds of administrative conditions placed on the grant to appellants falls comfortably within the scope of that language.

The government argues, however, that the plain meaning of the statutory language in subsection (i) cannot be taken at its face, and that controlling precedent requires a narrower reading of the statute than the words connote. In support of this proposition, the government cites (or cited before the Court of International Trade) several cases, specifically *K Mart Corp. v. Cartier, Inc.,* 485 U.S. 176 (1988); *National Corn Growers Association v. Baker,* 840 F.2d 1547 (Fed. Cir. 1988); *American Air Parcel Forwarding v. United States,* 718 F.2d 1546 (Fed. Cir. 1983), *cert. denied,* 466 U.S. 937 (1984); *United States v. Uniroyal, Inc.,* 687 F.2d 467, 475 (CCPA 1982); *Norcal/Crosetti Foods, Inc. v. United States,* 963 F.2d 356 (Fed. Cir. 1992); and *Miller & Co. v. United States,* 824 F.2d 961 (Fed. Cir. 1987), *cert. denied,* 484 U.S. 1041 (1988).

In *K Mart,* the Court of Appeals for the District of Columbia had held that the term "embargoes," used in paragraph (3) of subsection (i), did not give the Court of International Trade jurisdiction over certain "gray-market" goods, the importation of which was prohibited by § 526(a) of the Tariff Act of 1930, codified as amended, 19 U.S.C. § 1526

(1988).[20] The Supreme Court, although employing a different meaning of the term, arrived at the same conclusion.

The Court found no reason to depart from the ordinary meaning of the term "embargo," which it concluded meant a governmentally imposed quantitative restriction. *Id.* at 185. Thus the statute did not give jurisdiction to the Court of International Trade over § 526(a) cases, cases which amounted essentially to private enforcement actions on behalf of trademark owners. In reaching its decision the Court rejected both the Court of Appeals' interpretation of the term, which was keyed to embargoes that are grounded in trade policy, and petitioner 47th Street Photo's interpretation, which would have given the term a highly expansive reading based on a presumed Congressional intent to give the Court of International Trade the broadest possible jurisdiction. In rejecting petitioner's argument, the Court noted that Congress had drawn some fairly clear lines in the statute, and saw no reason to go beyond what Congress had written. The Court also noted that the Court of International Trade had rarely dealt with, much less developed a "specialized expertise" in general trademark law. *Id.* at 189.

In the case before us, there is little ground for dispute as to what is within the concept of "revenue from imports," or what "administration and enforcement" means with regard to matters relating to revenue from imports. Furthermore, there can be no question that we are here dealing with issues of governmental law and policy regarding customs and tariffs, the type of issues with which the Court of International Trade is acknowledged to have expertise. *K Mart* directs that in determining the jurisdiction of the Court of International Trade under § 1581 we stay within the parameters of the statute. That of course is unassailable advice; we have no difficulty in finding within the parameters of subsection (i) the precise terms needed to cover the issues here.

In *National Corn Growers,* we held that a domestic producer, challenging a decision by Customs to allow the importation of merchandise at what the producer considered to be an unlawfully low rate, could not obtain jurisdiction in the Court of International Trade under subsection (i) because the proper jurisdictional path for such a challenge was subsection (b). The producer had argued that relief under subsection (b) was manifestly inadequate under the authority of *Luggage & Leather Goods Manufacturers Id.* at 1556. We disagreed, recognizing the distinction between a decision which the Customs Service had no authority to override, and a decision which was "within the ambit of the Customs Service to correct." *Id.*

The remaining cases cited by the government all involved situations in which proceedings under other subsections of § 1581 could have provided effective review of the challenged action. In *American Air Parcel,* the available procedure was an accelerated protest proceeding followed by judicial review under subsection (a). *Id.* at 1550–51. In *Uniroyal,* it

[20] Gray-market goods are foreign-manufactured goods, bearing a United States trademark, which are imported without the consent of the United States trademark owner. *See K Mart,* 485 U.S. at 179.

was a protest proceeding followed by judicial review under subsection (a). *Id.* at 472. In *Norcal/Crosetti Foods,* it was a protest proceeding followed by judicial review under subsection (b). *Id.* at 360. In *Miller,* it was an administrative review of a countervailing duty order followed by judicial review under subsection (c). *Id.* at 964. Thus, none of these cases support the government's position.

The government's final argument, brought for the first time on appeal, is that appellants are foreclosed from proceeding under subsection (i) because they have not shown that relief under subsection (h) would be manifestly inadequate.[21] We disagree. Subsection (h) provides a limited mechanism for obtaining prospective relief from an action (or refusal to act) *by Treasury. See* H.R. Rep. No. 1235, at 46 ____, *reprinted in* 1980 U.S.C.C.A.N. at 3758. Thus, it suffers from the same infirmity as subsection (a)—it cannot provide effective review of an action of the Board, an agency independent of Treasury.[22]

We conclude that the Court of International Trade erred by acquiescing to the government's arguments and not exercising jurisdiction under subsection (i).[23] The protest procedure is manifestly inadequate. More to the point, this action is facially embraced by subsection (i)(1).[24] Appellants should have been allowed to proceed under subsection (i). Notwithstanding that Judge Carman, writing for the Court of International Trade, felt compelled by precedent to hold that his court lacked jurisdiction because the suit was premature, he expressed the following personal sentiments:

> This Court feels compelled to express its sense of exasperation and frustration with the results of this case. Individuals and firms are often required to expend an inordinate amount of time and money to obtain judicial review in this Court. They are required to navigate arcane jurisdictional passages. They waste time and resources fighting over jurisdiction and oftentimes they are denied a chance to be heard on the merits of the case. These obstacles unnecessarily increase cost and hurt the efforts of the United States to be competitive in the international community.

790 F. Supp. at 288–89.

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[21] That subsection reads:

> (h) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters, but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation.

[22] The government's argument—that the Secretary of the Treasury is a member of the Board, and thus could conceivably induce the Board to reverse its action upon a request by appellants—hardly needs response.

[23] Accordingly, we do not need to address appellants' alternative arguments that a threshold showing of manifest inadequacy is not required under the circumstances of this case, and that the Court of International Trade's failure to exercise jurisdiction under subsection (i) was a violation of due process.

[24] We have concluded that, as applied to this case, the FTZA is a statute "providing for revenue from imports." *See Luggage and Leather Goods Mfrs. of Am. v. United States,* 588 F. Supp. 1413, 1419 (Ct. Int'l Trade 1984). Thus, we reject the conclusion of the Court of International Trade in *Phibro Energy, Inc. v. Barbara H. Franklin,* Court No. 92–06–00394, 1993 Ct. Int'l Trade LEXIS 72, at *19–*20 (Ct. Int'l Trade 1993) that the FTZA *per se* governs export transactions only. The Court's conclusion was based on isolated statements in the legislative history, and ignores commercial realities.

Judge Carman states well the reasons why Congress granted to the Court of International Trade the jurisdiction it did. It is time to bring to an end the unproductive jurisdictional ping-pong games, and to give litigants their right to expeditious and timely decisions on the merits of their claims.

III. CONCLUSION

For all the foregoing reasons, we *reverse* the decision of the Court of International Trade dismissing the action for lack of subject matter jurisdiction, and *remand* the case to that court for an adjudication on the merits.

REVERSED AND REMANDED

KOYO SEIKO CO., LTD. AND KOYO CORP. OF U.S.A., INC., PLAINTIFFS/CROSS-APPELLANTS *v.* UNITED STATES, DEFENDANT, AND TIMKEN CO., DEFENDANT-APPELLANT

Appeal Nos. 93–1310 and 93–1341

NSK LTD. AND NSK CORP., PLAINTIFFS-APPELLEES *v.* UNITED STATES, DEFENDANT, AND TIMKEN CO., DEFENDANT-APPELLANT

Appeal No. 93–1311

(Decided March 28, 1994)

James R. Cannon, Jr., Stewart and Stewart, of Washington, D.C., argued for defendant-appellant. With him on the brief were *Eugene L. Stewart, Terence P. Stewart* and *John M. Breen.*

Susan P. Stommer, Powell, Goldstein, Frazer & Murphy, of Washington, D.C., argued for plaintiffs/cross-appellants. With her on the brief were *Peter O. Suchman* and *T. George Davis, Jr.*

Joseph F. Donohue, Jr., Donohue and Donohue, of New York, New York, argued for plaintiffs-appellees. With him on the brief was *Kathleen C. Inguaggiato.*

Appealed from: U.S. Court of International Trade.
Judge TSOUCALAS.

ARCHER, *Chief Judge,*[*] FRIEDMAN, *Senior Circuit Judge,* and RADER, *Circuit Judge.*

RADER, *Circuit Judge.*

Twenty years ago the Timken Company requested an antidumping investigation of tapered roller bearings (TRBs) four inches or less in outside diameter imported from Japan. The United States Department of Treasury initiated the investigation and calculated dumping margins for many TRB entries. Koyo Seiko Co., Ltd., Koyo Corporation of U.S.A., Inc. (collectively "Koyo"), NSK Ltd. and NSK Corporation (collectively "NSK") made extensive entries of TRBs between 1974 and 1979 which were subject to the investigation. In 1980, the Department of Commerce assumed responsibility for administering the antidumping law. Com-

[*] Chief Judge Archer assumed the position of Chief Judge on March 18, 1994.

merce commenced administrative reviews, gathered additional information, and recalculated the dumping margins.

In 1992, the Court of International Trade instructed Commerce's International Trade Administration (ITA) to disregard the data from its investigation of certain TRB entries and to liquidate them under Treasury's earlier dumping margins. On March 4, 1993, the trial court upheld ITA's reliance on Treasury dumping margins and the recalculation of dumping margins for the remaining TRB entries. Both parties appealed. This court reverses-in-part and affirms-in-part.

BACKGROUND

The Court of International Trade set forth the relevant facts for both of these cases in published opinions. *Koyo Seiko Co. v. United States,* 819 F. Supp. 1093 (Ct. Int'l Trade 1993); *Koyo Seiko Co. v. United States,* 796 F. Supp. 517 (Ct. Int'l Trade 1992); *NSK Ltd. v. United States,* 794 F. Supp. 1156 (Ct. Int'l Trade 1992). Therefore, this court may confine itself to the facts pertinent to this appeal.

On October 31, 1973, Timken filed a petition for imposition of antidumping duties on TRBs from Japan. *Tapered Roller Bearings from Japan; Antidumping Proceeding Notice,* 38 Fed. Reg. 33,408 (Dep't Treas. 1973). Under the Antidumping Act of 1921, 19 U.S.C. §§ 160–173 (1976), *amended by* 19 U.S.C. §§ 161, 168 (Supp. II 1978) (repealed 1979) (the 1921 Act), Treasury initiated an investigation and published a dumping finding on August 18, 1976. *Tapered Roller Bearings and Certain Components from Japan,* 41 Fed. Reg. 34,974 (Dep't Treas. 1976). The dumping finding covered Koyo's and NSK's entries. These entries, however, were never liquidated.

I. *Koyo v. United States:*

Between 1977 and 1980, Treasury prepared a series of master lists covering Koyo's TRB entries from April 1, 1974 through September 30, 1977 (the 1974–1977 entries). These master lists enabled U.S. Customs Service officials to appraise the entries and assess antidumping duties. One master list covered entries from April 1973 through December 1976. Another covered entries from January 1977 through September 1977. Koyo, however, disputed the accuracy of the 1973–1976 master list. Treasury suspended this master list due to possible errors.

Effective January 1, 1980, Congress enacted the Trade Agreements Act of 1979 (Trade Agreements Act). The Trade Agreements Act of 1979, Pub. L. No. 96–39, 93 Stat. 144 (codified as amended in scattered sections of 19 U.S.C.). The Trade Agreements Act repealed the 1921 Act and amended the Tariff Act of 1930. Section 106(a), 93 Stat. at 193. Section 751(a) of the Trade Agreements Act made dumping findings under the 1921 Act subject to an annual review. Section 751(a), 93 Stat. at 175 (current version at 19 U.S.C. § 1675(a) (1988)).

On January 2, 1980, Commerce assumed administration of the antidumping laws. Exec. Order No. 12,188, 3 C.F.R. 131 (1981), *reprinted in* 19 U.S.C. § 2171 (1988). Commerce's ITA issued a corrected master list with a lower dumping margin for the January 1977 to September 1977

entries. On March 28, 1980, ITA began a section 751(a) administrative review of the 1976 dumping finding. *Administrative Review of Antidumping Determinations*, 45 Fed. Reg. 20,511 (Dep't Comm. 1980). ITA suspended liquidation of entries covered by master lists under section 751(a) review. ITA began to verify Koyo's submitted information and reevaluate the dumping margins.

In 1982, Commerce reached some preliminary results in its administrative review. The preliminary draft contained dumping margins of 1.95% or less for Koyo's TRB entries from April 1973 to July 1980. Although disclosed to Koyo, these results were not published. Again, Customs did not liquidate any Koyo entries under these dumping margins.

On September 19, 1983, Timken submitted to ITA an allegation that Koyo sold TRBs in its home market at prices below the full cost of production. In response, ITA initiated a cost-of-production (COP) investigation for Koyo's TRB entries from April 1, 1978 through March 31, 1979 (the 1978–1979 entries).

In 1984, section 751(a) was amended to require annual reviews only upon the request of interested parties. 19 U.S.C. § 1675(a). Timken requested such a review. ITA requested additional data from Koyo and conducted verifications of Koyo's submitted information. Accordingly, ITA discovered likely inaccuracies in the previous dumping margins. In response, Koyo requested several extensions of time. ITA noted several times that Koyo's submissions were incomplete. In 1986, Koyo finally informed ITA that all documents for entries before 1980 had been destroyed.

During this process, ITA twice changed its methodology for calculating dumping margins, first adopting a three-criteria and then a five-criteria test. In 1987, ITA concluded that Koyo's submission was unacceptable. In addition, ITA noted that Koyo resisted requests for additional data. ITA therefore used a combination of data from its investigation and the "best information available" for the April 1974 to July 1985 TRB entries. *See* 19 U.S.C. § 1677e(c) (1988).

Finally, on June 1, 1990, ITA issued its final determination. *Tapered Roller Bearings Four Inches or Less in Outside Diameter From Japan; Final Results of Antidumping Duty Administrative Review*, 55 Fed. Reg. 22,369 (Dep't Comm. 1990)*(TRB Final Results)*. The determination relied on the data from ITA's investigation and "best information available" after Commerce took over the investigation, not on the Treasury master lists. *Id.* at 22,370, 22,375–76. Over Koyo's objection, ITA performed a cost-of-production (COP) analysis based on the best information available for the 1978–1979 entries. Thus, ITA disregarded sales in the home market below the COP when computing the foreign market value of the TRBs. *See* 19 U.S.C. § 1677b(b) (1988). Under this method, Koyo's final dumping margins ranged from 18.81% to 35.89% for 1974–1977 and 1978–1979 entries.

Koyo challenged these results in the Court of International Trade. On May 15, 1992, the trial court granted Koyo's motion to liquidate the 1974–1977 TRB entries according to the pre-existing Treasury master lists, excluding the results of ITA's later investigation. The trial court also remanded the case with instructions to, *inter alia,* recalculate dumping margins for the 1978–1979 entries without reference to the COP investigation.

On August 21, 1992, the Court of International Trade denied Timken's motion for rehearing on the COP analysis issue. The court permitted Timken, however, to supplement its original below-cost allegation with information not derived from ITA's investigation.

On remand, ITA used a Treasury master list covering the 1977 entries that was corrected by Commerce in 1980. ITA determined to liquidate these entries in accordance with these corrections, and the 1974–1976 entries in accordance with the other Treasury master list. In addition, Timken's supplemental disclosure showed a reasonable probability that Koyo sold TRBs in the home market below cost. On the basis of this showing, ITA undertook a new COP investigation. Again ITA calculated new dumping margins for the 1978–1979 entries. This new calculation also excluded from the foreign market value sales below cost in the home market. The new final margins were 17.96% and 24.64% for the 1978–1979 entries. Timken challenged these results in the trial court, arguing that ITA could not use Treasury's 1977 master list as corrected by ITA in 1980.

II. *NSK v. United States:*

NSK's TRB entries fell within Treasury's August 18, 1976 dumping finding. *Tapered Roller Bearings and Certain Components from Japan,* 41 Fed. Reg. 34,974 (Dep't Treas. 1976). Treasury issued three master lists for NSK's entries from May 1, 1974 to March 31, 1978 (the 1974–1978 entries). Treasury, however, doubted the accuracy of these master lists. In an Investigation Report dated October 17, 1979, Treasury noted that NSK could not substantiate many of its claims. Treasury suspended the master list covering the 1977–1978 entries. There is no evidence that NSK's entries were liquidated under these master lists.

In 1980, Commerce's ITA assumed administration of the antidumping law and commenced annual section 751(a) reviews. On May 19, 1980, NSK applied for revocation of the antidumping order. At ITA's request, starting in 1981 NSK submitted a series of reports. These reports showed *de minimis* dumping margins for TRB sales from May 1974 through July 1980.

Based on NSK's calculations, ITA drafted in 1982 a preliminary determination. ITA did not publish these preliminary results. ITA received an objection that NSK had calculated its own dumping margins. In response to this objection, ITA sought to obtain NSK's raw data to recalculate independently the dumping margins. NSK did not produce all of the data requested by ITA.

In 1986, ITA began another section 751(a) review of NSK's TRB entries from April 1, 1974 through July 31, 1980. After using three different methodologies to calculate dumping margins, ITA published its final results on June 1, 1990. *TRB Final Results,* 55 Fed. Reg. 22,369. This determination did not rely on the pre-existing Treasury master lists. Rather, the determination rested on information developed during ITA's own lengthy investigation. NSK challenged the final results in the Court of International Trade.

On May 21, 1992, the trial court ordered liquidation of entries between May 1, 1974 and March 31, 1978 in accordance with Treasury master lists predating the transfer of jurisdiction to Commerce. On remand, ITA corrected a clerical error and ordered liquidation in accordance with corrected Treasury master lists. NSK appealed again to the trial court.

III. *The Court of International Trade Decision:*

The trial court addressed the Timken and NSK appeals in its March 4, 1993 decision. The court held, *inter alia,* that Commerce acted reasonably in using the Treasury master lists for Koyo's 1974–1977 entries and NSK's 1974–1978 entries. In addition, the court upheld ITA's decision to correct the master lists for Koyo and the final results for NSK. Thus, the Court of International Trade upheld the remand results in all respects, including ITA's reliance on the COP analysis for Koyo's 1978–1979 entries.

Timken appeals the trial court's decision to liquidate Koyo's 1974–1977 entries and NSK's 1974–1978 entries according to Treasury master lists. Koyo cross-appeals to challenge the court's approval of ITA's COP analysis in calculating dumping margins for the 1978–1979 entries.

ANALYSIS

Title 19 authorizes the Court of International Trade to review final results of an ITA administrative review. 19 U.S.C. § 1516a (a)(2)(B)(iii) (1988); *U.H.F.C. Co. v. United States,* 916 F.2d 689, 696, 9 Fed. Cir. (T) 1, 8 (Fed. Cir. 1990). When reviewing an ITA determination, the trial court must "hold unlawful any determination, finding, or conclusion found * * * to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B). This appellate court reviews the trial court's decision by applying anew the statute's express judicial review standard. *PPG Indus. v. United States,* 978 F.2d 1232, 1236, ___ Fed. Cir. (T) ___, ___ (Fed. Cir. 1992).

I

The trial court ordered ITA to liquidate Koyo's 1974–1977 entries and NSK's 1974–1978 entries under the Treasury master lists. The court, relying on its *Timken Co. v. Regan,* 552 F. Supp. 47 (Ct. Int'l Trade 1982), decision, reasoned that section 751(a) does not permit annual review of entries covered by master lists issued before the effective date of the Trade Agreements Act.

Section 751(a) of the Trade Agreements Act, as initially enacted, directed ITA to conduct annual administrative reviews of antidumping duty orders:

> At least once during each 12-month period beginning on the anniversary of the date of publication of a countervailing duty order under this title or under section 303 of this Act, an antidumping duty order under this title or a finding under the Antidumping Act, 1921, or a notice of the suspension of an investigation, the administering authority, after publication of notice of such review in the Federal Register, shall—
>
> (A) review and determine the amount of any net subsidy,
>
> (B) review, and determine * * * the amount of any antidumping duty, and
>
> (C) review the current status of, and compliance with, any agreement by reason of which an investigation was suspended, and review the amount of any net subsidy or margin of sales at less than fair value involved in the agreement,
>
> and shall publish the results of such review, together with notice of any duty to be assessed, estimated duty to be deposited, or investigation to be resumed in the Federal Register.

Section 751(a), 93 Stat. at 175.

Section 751(a) did not limit the obligation to perform annual reviews to antidumping duty orders issued under the Trade Agreements Act of 1979. Rather, section 751(a) expressly subjected findings under the 1921 Act to 751(a) review. In the words of the statute, administrative review extended to "an antidumping duty order under this title or a finding under the Antidumping Act, 1921." *Id.*

Moreover, section 106(a) of the Trade Agreements Act expressly made "findings in effect on the effective date of this Act, or issued pursuant to court order in an action brought before that date * * * subject to review under section 751." Section 106(a), 93 Stat. at 193. Thus, the Trade Agreements Act made findings pending under the 1921 Act subject to section 751(a) annual review.

Section 751(a) did not exclude findings which had progressed to the assessment phase from the ambit of section 751(a) review. Rather, subpart (1)(B) of the section grants Commerce authority to review the amount of any antidumping duty. The 1921 Act, as well as the Trade Agreements Act, set the amount of the antidumping duty during the assessment phase of the proceeding. Thus, subpart (1)(B) envisions review of the entries covered by master lists and other procedures setting the "amount of any antidumping duty."

The enactment history of section 751(a) of the 1979 Act underscores that annual reviews extend to the assessment phase of the antidumping investigation. Both the House and Senate reports explaining section 751(a) contain identical language:

> [Section 751 review] expedites the administration of the assessment phase of antidumping and countervailing duty investigations.

H.R. Rep. No. 317, 96th Cong., 1st Sess. 72 (1979); S. Rep. No. 249, 96th Cong., 1st Sess. 80–81 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 466–67. In sum, section 751(a) review includes administrative review of unliquidated entries covered by master lists—the assessment phase—as part of the review of findings.

Moreover, section 751(a) expressly contemplated the resumption of an investigation as a result of an administrative review. Thus, ITA had the authority to resume Treasury investigations. Section 751(a) implies that ITA could recalculate dumping duties based on information from the reinitiated investigation.

Under section 751(a), ITA could either rely on Treasury master lists as best information available, *see Tapered Roller Bearings and Certain Components Thereof From Japan,* 49 Fed. Reg. 8,976, 8,977 (Dep't Comm. 1984), or recalculate dumping margins based on information gathered during its reinitiated investigation. While the scope of the reinitiated investigation is limited by the terms of the underlying Treasury dumping finding, *see Alsthom Atlantique v. United States,* 787 F.2d 565, 571, 4 Fed. Cir. (T) 71 (1986), the dumping finding itself is clearly not immune from section 751(a) review.

In accordance with section 751(a), ITA initiated annual reviews of outstanding dumping findings under the Antidumping Act of 1921. *Administrative Review of Antidumping Determinations,* 45 Fed. Reg. 20,511 (Dep't Comm. 1980). ITA properly listed the August 18, 1976 dumping finding as subject to review.[1] Although the proceedings in this case had progressed to the assessment phase, section 751(a) envisioned a renewal of administrative review of the dumping duties.

In this case, ITA encountered master lists which it had reason to believe were inaccurate or incomplete. Indeed, ITA discovered that NSK and Koyo could not substantiate much of their data. ITA thus resumed the investigation under the authority of section 751(a) and recalculated dumping margins using data from its investigation and the "best information available." The trial court erred in requiring ITA to liquidate Koyo and NSK entries under the flawed Treasury master lists.

The trial court also erred in concluding that section 1002(b)(3) "reflects Congress' intent that any cases pending before the effective date of the bill 'and cases which were far advanced in the administrative process before the effective date, are to proceed as if the bill had not been enacted into law.'" *Koyo Seiko,* 796 F. Supp. at 522 (quoting S. Rep. No. 249, at 255, *reprinted in* 1979 U.S.C.C.A.N. at 641). Section 1002(b)(3) provided:

> (b) TRANSITIONAL RULES.—
>
> * * * * * * *

[1] The scope of the reviews included "all entries with dates of purchase or export, as appropriate, occur[r]ing subsequent to the period covered by the last published master list, or, as a minimum, the last 12–month period." *Administrative Review of Antidumping Determinations,* 45 Fed. Reg. 20,511, 20,512 (Dep't Comm. 1980). The notice therefore embraced entries within the last 12 months yet covered by a master list. ITA later determined to subject all unliquidated entries at issue covered by the 1976 dumping finding to administrative review.

> (3) CERTAIN COUNTERVAILING AND ANTIDUMPING DUTY ASSESSMENTS.—The amendments made by this title shall apply with respect to the review of the assessment of, or failure to assess, any countervailing duty or antidumping duty on entries subject to a countervailing duty order or antidumping finding if the assessment is made after the effective date. If no assessment of such duty had been made before the effective date that could serve the party seeking review as the basis of a review of the underlying determination, made by the Secretary of the Treasury or the International Trade Commission before the effective date, on which such order, finding, or lack thereof is based, then the underlying determination shall be subject to review in accordance with the law in effect on the day before the effective date.

93 Stat. at 307 (reprinted at 19 U.S.C. § 1516a note (1988)).

Section 1002 is within Title X of the Trade Agreements Act. Title X, containing two sections, pertains solely to judicial review. Section 1001 of title X provides judicial review for antidumping and countervailing duty cases under the Act.

Section 1002 sets forth the Act's effective date and gives transitional rules for judicial review, not ongoing administrative review, of pending antidumping proceedings. It does not address at all section 751(a) administrative review of cases. It does not require that entries must be liquidated in accordance with pre-existing master lists.

Again the enactment history illuminates the meaning of section 1002. Both the House and Senate reports explain that section 1002's transitional rules merely provide judicial review under Title X for certain assessments made after the effective date:

> Generally, the bill would provide for judicial review of pending cases, and cases which were far advanced in the administrative process before the effective date, to proceed as if the bill had not been enacted into law.

S. Rep. No. 249, at 255, *reprinted in* 1979 U.S.C.C.A.N. at 641; *see also* H.R. Rep. No. 317, at 182–83.

The trial court erred in reading section 1002 as limiting administrative review under section 751(a). Section 1002(b)(3) applies only to preserve judicial review of cases initiated under the Antidumping Act of 1921.

Section 102 of the Trade Agreements Act also does not limit, or address at all, application of section 751(a) review to entries covered by master lists. Section 102, 93 Stat. at 189 (1979) (reprinted at 19 U.S.C. § 1671 note (1988)). Section 102 merely specified how the time limits of the Trade Agreements Act apply to cases pending under the 1921 Act. Section 102 simply does not exclude any pending antidumping cases from section 751(a) review. In sum, sections 1002(b)(3) and 102 do not limit at all the statutory language applying section 751(a) to entries covered by pre-existing Treasury master lists.

Although Treasury published its dumping finding in 1976, ITA did not publish a Final Determination until 1990. The undue length of this investigation understandably and justifiably disturbed the Court of International Trade. The Trade Agreements Act sought, among other objectives of the Act, to encourage expeditious determination and assessment of antidumping duties. *See, e.g.*, S. Rep. No. 249, at 66, *reprinted in* 1979 U.S.C.C.A.N. at 452 ("A major objective of this revision of the antidumping duty law is to reduce the length of an investigation."); *id.* at 76–77, *reprinted in* 1979 U.S.C.C.A.N. at 462–63 ("In light of the dismal performance of the Department of the Treasury in assessing special dumping duties in the recent past, the committee considers this time limit on assessment to be an extremely important addition to the law.").

The excessive delays in this case, however, did not require ITA to rely on inaccurate or incomplete master lists. The Trade Agreements Act also sought to provide fair assessment of antidumping duties to protect domestic industry. *See* H.R. Rep. No. 317, at 44 (1979)(Key United States objectives are "to provide effective relief from injurious dumped imports * * * and to ensure fair and equitable treatment of all parties concerned with antidumping proceedings."). In sum, the Act did not sacrifice fairness and accuracy for the sake of expediency alone. *See* H.R. Rep. No. 317, at 72 (Section 751 "expedites the administration of the assessment phase of antidumping * * * duty investigations while providing a greater role for domestic interested parties and introducing more procedural safeguards."). The inordinate length of this investigation does not override the trial court's duty to ensure ITA's compliance with the review obligations of section 751(a). This court reverses-in-part and remands both cases to determine the dumping margins for Koyo's 1974–1977 entries and NSK's 1974–1978 entries.

II

Koyo cross-appeals the trial court's decision to allow ITA to conduct a COP investigation. Koyo argues that Timken did not timely file its below-cost allegation. Koyo appeals the trial court's alleged failure to address the timeliness issue.

Section 773(b) of the Tariff Act states:

> Whenever the administering authority has reasonable grounds to believe or suspect that sales in the home market of the country of exportation * * * have been made at prices which represent less than the cost of producing the merchandise in question, it shall determine whether, in fact, such sales were made at less than the cost of producing the merchandise.

19 U.S.C. § 1677b(b). In 1983, Timken submitted an allegation that Koyo sold TRBs in Japan below its own cost of production. At that time, no statute or regulation set a time limit for submission of such allegations. ITA determined the timeliness of below-cost allegations on a case-by-case basis. ITA generally relied on two factors to decide an allegation's timeliness: (1) whether the petitioner submitted the allega-

tion either before publication of preliminary results or with enough time remaining in the investigation to allow a proper COP investigation; and (2) if not, whether the petitioner had sufficient information before the preliminary determination to allow earlier filing of the allegation. *See, e.g., Certain Carbon Steel Butt-Weld Pipe Fittings from Taiwan; Final Determination of Sales at Less Than Fair Value,* 51 Fed. Reg. 37,772, 37,773 (Dep't Comm. 1986) (allegation submitted 70 days before due date of final determination deemed untimely because the ITA determined that it required at least 86 days to perform an investigation and because petitioner had sufficient information to justify a timely filing); *Color Television Receivers from Korea; Final Results of Antidumping Duty Administrative Review,* 51 Fed. Reg. 41,365, 41,374 (Dep't Comm. 1986) (allegation deemed untimely because insufficient time remained before the final due date and because the petitioner had sufficient information earlier to file a timely allegation); *Certain Steel Valves and Certain Parts Thereof from Japan; Final Determination of Sales at Less Than Fair Value,* 49 Fed. Reg. 25,266, 25,268 (Dep't Comm. 1984); *Bicycle Speedometers from Japan; Final Results of Administrative Review of Antidumping Finding,* 47 Fed. Reg. 28,978, 28,979 (Dep't Comm. 1982); *cf. Tempered Sheet Glass from Japan; Final Results of Administrative Review and Revocation of Antidumping Finding,* 49 Fed. Reg. 8,975, 8,976 (Dep't Comm. 1984) (allegation submitted after publication of the preliminary results timely because petitioner did not know of the below-cost sale until after the publication).

ITA did not depart from this standard in accepting Timken's allegation. Timken submitted its allegation in 1983; ITA published its preliminary results for Koyo's 1978–1979 entries in 1989. *Tapered Roller Bearings Four Inches or Less in Outside Diameter and Certain Components Thereof from Japan, Preliminary Results of Antidumping Duty; Administrative Review,* 54 Fed. Reg. 12,938 (Dep't Comm. 1989). ITA treated Timken's 1983 petition as timely. *TRB Final Results,* 55 Fed. Reg. at 22,370.[2] The trial court properly sustained ITA's action.

CONCLUSION

This court reverses the Court of International Trade's affirmance of ITA's liquidation of Koyo's 1974–1977 and NSK's 1974–1978 TRB entries under the Treasury master lists. This court remands both cases for a redetermination of final dumping margins. In addition, this court affirms the trial court's affirmance of ITA's incorporation of its COP investigation into its final results for Koyo's 1978–1979 TRB entries.

COSTS

Each party shall bear its own costs.

AFFIRMED-IN-PART, REVERSED-IN-PART, AND REMANDED

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[2] In addition to treating Timken's 1983 petition as timely, ITA determined that another Timken petition was not timely:

> Timken did not raise the issue of sales below cost for the earlier periods until after we published the preliminary results and, therefore, the request was untimely.

TRB Final Results, 55 Fed. Reg. at 22,370.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

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Jane A. Restani
Thomas J. Aquilino, Jr.
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Clerk

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PUBLIC VERSION

(Slip Op. 96–103)

PAUL T. BENNETT, PLAINTIFF *v.* U.S. SECRETARY OF LABOR, DEFENDANT

Court No. 93–02–00080

[Upholding the Department of Labor's *Negative Determination On Reconsideration* (60 Fed. Reg. 19413 (April 18, 1995)).]

(Decided June 26, 1996)

Sidney N. Weiss, Esq., for plaintiff.
Frank W. Hunger, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Steven J. Abelson)*, of counsel: *Scott Glabman*, Office of the Solicitor, U.S. Department of Labor for defendant.

OPINION

MUSGRAVE, *Judge:* Plaintiff moves this Court for judgment upon the agency record overturning the negative remand determination of the Department of Labor ("Labor") in this case *(Negative Determination On Reconsideration* (60 Fed. Reg. 19413 (April 18, 1995)). Plaintiff also requests a second remand ordering a further investigation. Plaintiff contends that Labor's negative remand determination denying his petition seeking eligibility for certification of trade adjustment assistance benefits is not supported by substantial evidence and is not in accordance with law. On the basis of plaintiff's motion, Labor's opposition thereto, and plaintiff's reply, the Court finds that Labor's negative remand determination is based on substantial evidence and is otherwise in accordance with law pursuant to the Trade Act of 1974 as amended, 19 U.S.C. § 2272 and 19 U.S.C. § 2395 (1988). The Court entertains jurisdiction to determine this matter under 19 U.S.C. § 2395 (c).

Negative determinations by Labor denying certification for trade adjustment assistance eligibility are upheld by this Court if they are supported by substantial evidence. 19 U.S.C. § 2395(b). "Substantial evidence is something more than a 'mere scintilla,' and must be enough

reasonably to support a conclusion." *Ceramica Regiomanta, S.A. v. United States,* 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986), *aff'd,* 5 Fed Cir. (T) 77, 810 F.2d 1137 (1987) (citations omitted). The Court may remand a trade adjustment assistance case and order Labor to conduct further investigations if "good cause [is] shown." 19 U.S.C. § 2395(b). "'Good cause' exists if [Labor's] chosen methodology is so marred that [the] finding is arbitrary or of such a nature that it could not be based on substantial evidence." *Former Employees of Linden Apparel Corp. v. U.S.,* 13 CIT 467, 469, 715 F. Supp. 378, 381 (1989) (quotations omitted).

BACKGROUND

Plaintiff is a former toolmaker at Allied Signal's Tempe, Arizona plant. Plaintiff made tools that were incorporated into machines such as lathes, and production workers used those tools to produce finished goods. The Tempe plant produces, *inter alia,* M–1 Abrams tank valve systems, jet engine starters, and other hardware for use in military and civilian aircraft. Plaintiff alleged in his petition that the transfer of some tooling and tooling operations to Allied Signal's Singapore plant caused his unemployment such that he is entitled to relief under 19 U.S.C. § 2272.

In order for a *production* worker separated from a firm to be certified, 19 U.S.C. § 2272(a)(2) requires that "sales or production, or both, of such firm or subdivision [must] have *decreased absolutely";* 19 U.S.C. § 2272(a)(3) further requires that "the increases of imports or articles like or directly competitive with articles produced by such workers' firm * * * [must have] *contributed importantly* to such total or partial separation * * * and to such decline in sales or production." (emphasis added) On October 13, 1992, Labor published the notice of its negative determination basing its finding on § 2272(a)(3): Labor determined pursuant to that provision that "increased imports [of like products] did not contribute importantly to worker separations at the firm." *(Determinations Regarding Eligibility To Apply For Worker Adjustment Assistance,* 57 Fed. Reg. 46880 (October 13, 1992)). Plaintiff appealed Labor's negative determination and the Court ordered a remand *(Bennett v. United States Secretary of Labor,* 18 CIT ____, Slip Op. 94–179, (November 18, 1994)).

The Court identified several reasons for ordering the remand. The Court found that Labor: (1) failed to interview plaintiff's listed witnesses; (2) relied on unsupported, conclusory statements made by Allied Signal's Compensation and Benefits Manager, Mr. Roche, in concluding that production was not transferred from the Arizona to the Singapore plant; (3) performed a flawed survey of Allied Signal's customers in connection with its import substitution investigation; (4) based its determination on imports of military parts even though plaintiff alleged that he worked on civilian applications; and (5) failed to explain how the data it collected demonstrated that production had not decreased or that

imports did not cause the unemployment. Accordingly, the remand order declared:

> ORDERED that in its remand the Department of Labor shall investigate allegations made by plaintiff's eye-witness, Mr. Jack Reese, and plaintiff's list of witnesses provided by Mr. Jeffrey Whitehead; and it is further
>
> ORDERED that in its remand the Department of Labor shall request and verify all supporting documentation and explain the relevance of this information as it relates to its determination; * * *

After conducting the further investigations ordered by the Court, Labor published its *Negative Determination On Reconsideration* at 60 Fed. Reg. 19413 (April 18, 1995).

DISCUSSION

In connection with its reconsideration, Labor sent letters to plaintiff's witnesses whom it could locate, who comprised most of the witnesses listed by plaintiff. In response to the letter, plaintiff's eyewitness and former foreman, Mr. Reese, refused to provide sworn testimony to Labor. However, plaintiff's attorney, Mr. Weiss, submitted an affidavit to the Court testifying that statements made by Mr. Reese and attached to his affidavit accurately and truly reflected an interview he conducted with Mr. Reese. During that conversation, Mr. Reese reported to Mr. Weiss that his refusal to supply sworn testimony was based upon a termination agreement with Allied Signal in which he agreed not to disclose certain information. Mr. Reese further reported, [ ] Mr. Reese provided the same information to Labor in a telephonic conversation, and also advised Labor that he was in possession of no extrinsic evidence that would corroborate his assertions. With regard to the other witnesses whom Labor could locate, Labor sent them the initial negative determination along with a request for any information they possessed which would suggest that the initial determination was erroneous. Each witness replied that he possessed no such information. Although plaintiff contends that these latter witnesses would not have been forthcoming with any contradictory evidence due to their reluctance to impugn the assertions by their current superior, Mr. Roche, the form letters made no reference to Mr. Roche and there is no evidence on the record that the alleged intimidation was actual. The Court finds that Labor's efforts adequately discharged its duty to interview plaintiff's witnesses.

In order to rectify its undue reliance on the conclusory statements of Allied Signal's Compensation and Benefits Manager, Mr. Roche, Labor sought more information from Allied Signal to determine the extent of any import substitution. Allied Signal's Manufacturing Manager, Mr. William Scott, responded,

> [ ]

Conf. Supp. Adm. R. at 6. Allied Signal's Manufacturing Unit Manager, Mr. Jim Nicholson, also advised that he possessed no information that

would contradict the initial negative determination. Conf. Supp. Adm. R. at 8. These efforts by Labor to supplement the statements of Mr. Roche were sufficiently responsive to the Court's order and adequately supported the finding that substantial production was not resourced to Singapore.

In its decision ordering a remand, the Court opined that Labor had performed a flawed survey of Allied Signal's customers in connection with its import substitution investigation. The Court reasoned,

> Labor ignores the fact that plaintiff claims that the jobs were lost to imports by their company of tooling and forging of parts which were subsequently integrated into larger components which were later sold by Allied Signal to its regular customers. Allied Signal's customers could not have known that they were purchasing foreign machined (of U.S. cast) parts because the final-assembled product was marked with U.S. country of origin.

Bennett, Slip Op. 94–179 at 7. In its brief currently before the Court, Labor explains the propriety of the survey methodology faulted by the Court:

> Apparently, the Court was of the opinion that the surveyed customers continued to buy products from the Tempe plant during the period of investigation, and that, therefore, the stamp on Tempe products indicating that they were made in the United States prevented the customers from knowing that the end product contained imported parts. However, the survey was a survey of Tempe's unsuccessful bids for contracts with its regular customers. After award of the contracts to other bidders, the surveyed companies stopped purchasing the equipment in question. Consequently, Labor's survey investigated whether these past customers substituted imported products for the equipment they used to buy from Tempe.

Therefore, Labor apparently did not alter its survey methodology. In its reconsideration on remand, Labor determined, "The survey showed no foreign impact since the successful awardees were all domestic firms." 60 Fed. Reg. at 19413. The Court accepts Labor's explanation for its methodology and finds that substantial evidence on the record supports Labor's determination that import substitution evidence was not veiled by imported machinery that contained components lacking country of origin markings.

Labor requested and received a financial breakdown from Allied Signal that demonstrated a [ ] in Tempe's commercial sales between 1991 and 1992. Conf. Supp. Adm. R. at 14. The *Negative Determination on Remand* also declared:

> The Department's denial was based on the fact that the increased import criterion and the "contributed importantly" test of [19 U.S.C. § 2272] were not met. U.S. imports of parts for military aircraft decreased in the latest 12-month period May through April 1991–1992 compared with the same period in 1990–1991. The Department obtained a breakout of Tempe's sales for 1990, 1991,

> and 1992 together with Tempe's purchases from Singapore. All of Singapore's sales went to Tempe. Tempe's purchases from Singapore declined in 1991 and 1992 compared to the year immediately prior. Although production was resourced to Singapore, the major share came from Allied Signal's outside domestic subcontractors and as such did not have any adverse effect on Allied Signal's Tempe facility. Further, Tempe's purchases from Singapore were insignificant when compared to total Tempe's sales and would not form a basis for a worker group certification. Tempes Singapore purchases accounted for only 1.4% of Tempe's sales in both 1990 and 1991 and declined to 1.2% of Tempe's sales in 1992. Tempe's sales in 1992 were relatively constant declining only about 1.2% compared to 1991. Some major categories of sales actually increased in 1992 compared with 1991 * * *. The findings show that worker separations occurred because of corporate reorganizing and redesigning.

60 Fed. Reg. at 19413.

Plaintiff was a support service worker to Allied Signal's production and therefore was not a production worker himself. Citing *Abbott v. Donovan,* 6 CIT 92, 570 F. Supp. 41 (1983), Labor argues that service workers such as plaintiff are eligible for certification when (1) their separation is caused by a reduced demand for their services from a production department whose workers independently meet the statutory criteria for certification, and (2) the reduction directly relates to the import-impacted article. Labor points to the overall decrease in military imports to establish that the requirement of increased imports under 19 U.S.C. § 2272(a)(3) could not have been met. Furthermore, even if relevant commercial imports had increased, the [ ] in Allied Signal's commercial sales would have failed the requirement of decreased sales under 19 U.S.C. § 2272(a)(2). These two factors demonstrate that no independent certification of production workers could have obtained. In addition, the small amount of production diverted to Singapore and the shift in reliance from in-house tool workers to domestic subcontractors reinforce the fact that imports did not contribute importantly to plaintiff's separation.

The Court holds that Labor permissibly and reasonably interpreted the statute in formulating the test for certifying support service workers in the fashion sanctioned previously by *Abbott,* 6 CIT 92, 570 F. Supp. 41. The evidence failed to demonstrate threshold certification eligibility under both the "decreased sales" prong of 19 U.S.C. § 2272(a)(2) and the "contributed importantly" prong of 19 U.S.C. § 2272(a)(3). Labor adequately rectified the shortcomings identified by the Court in its decision ordering a remand and the evidence Labor gleaned during the new investigation produced substantial evidence that plaintiff is not entitled to be certified as eligible for trade adjustment assistance.

CONCLUSION

Labor's *Negative Determination On Reconsideration* in this case is supported by substantial evidence on the record and is otherwise in accordance with law pursuant to 19 U.S.C. § 2395(b). Labor's remand

determination rectified the problems inherent in its initial negative determination which contained both procedural and substantive deficiencies. Therefore, plaintiff has failed to demonstrate good cause for a second remand ordering a further investigation.

(Slip Op. 96–119)

TONY J. NELSON, PLAINTIFF *v.* U.S. SECRETARY OF LABOR, DEFENDANT

Court No. 94–10–00630

[Defendant's motion for dismissal is granted.]

(Dated July 26, 1996)

Appearances:

Hodes & Pilon, (James L. Sawyer, Michael G. Hodes, Esqs.), counsel for plaintiff.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Nuriye C. Uygur,* Esq.); Annaliese Impink, Esq. Attorney Advisor, Office of the Solicitor, United States Department of Labor, of counsel, for defendant.

OPINION AND ORDER

NEWMAN, *Senior Judge:* Plaintiff, a former employee of VIC Manufacturing Company, seeks an order reversing the negative determination of the United States Department of Labor ("Labor") regarding a petition for certification on behalf of plaintiff and two others for trade adjustment assistance benefits pursuant to 19 U.S.C. § 2273. Defendant moves for dismissal of the action under Rule 12(b)(1) of the Rules of the United States Court of International Trade[1], asserting that the court lacks jurisdiction to consider plaintiff's claim because two of the three members of the group were separated from employment more than one year prior to the filing of the petition. Plaintiff responds that because one member of the group falls within the one year requirement, the jurisdiction of the court is properly invoked. For the following reasons defendant's motion is granted and the action is dismissed.

BACKGROUND

On May 9, 1994 Tony J. Nelson, Raymond Menard and Roger Samuall filed a petition for trade adjustment assistance ("the petition") on behalf of workers at VIC Manufacturing Company ("VIC") under The Trade Act of 1974. 19 U.S.C. § 2271 *et seq.* Labor signed a Notice of Inves-

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[1] Rule 12 (b)(1) provides in pertinent part:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counter-claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the opinion of the pleader be made by motion: (1) lack of jurisdiction over the subject matter * * *

United States Court of International Trade, Rule 12(b)(1).

tigation on June 13, 1994. Upon conducting its investigation, Labor announced a "Negative Determination Regarding Eligibility To Apply for Worker Adjustment Assistance," and denied the petitioners' claim on August 15, 1994. Petitioners request for reconsideration was denied by Labor on September 19, 1994.

In a letter to this court dated October 15, 1994 plaintiff,[2] at the time *pro se,* sought judicial review of the adverse administrative determination. The Clerk of the Court accepted plaintiff's letter as fulfilling in principle the requirements of the summons and complaint seeking review of a final determination regarding certification of eligibility. With the consent of plaintiff, defendant sought a remand to conduct further investigations. On August 30, 1995 the court granted defendant's motion for remand and Labor subsequently conducted a supplemental investigation.

On January 29, 1996 defendant filed its supplemental administrative record which affirmed its prior negative determination. In addition to reaffirming its previous findings, Labor also stated that:

> [petitioners'] TAA petition [was] filed on behalf of the workers of VIC Manufacturing was dated May 9, 1994. The date of worker separation for Tony Nelson, petitioner number 1, was January 29, 1993, and for Raymond Menard petitioner number 2, November 11, 1992. The third petitioner was within the scope of consideration. However, a valid petition must be signed by three affected workers. Mr. Nelson and Mr. Menard were separated from employment with Vic Manufacturing more than one year prior to the date of the petition was filed. The Trade Act does not give the Secretary authority to waive this statutory limitation.

(Supplemental Administrative Record, at 11–12). Accordingly, on February 23, 1996 defendant filed the instant motion for dismissal.

Discussion

The issue presented is whether the defendant may validly deny certification to a group when two of the three petitioners were separated from employment more than one year prior to the filing of the petition. The court has previously upheld a denial of certification of eligibility when the entire group had failed to file their petition within a year of separation from the firm. *Former Employees of Westmoreland v. United States,* 10 CIT 784, 650 F.Supp. 1021 (CIT 1986). The very issue raised by the instant matter was recently addressed in a case before the court. *See, Pauling v. Reich,* 20 CIT___, ___ F. Supp. ___, Slip Op. 96–52 (CIT March 11, 1996). There, the court was faced with a petition which had been signed by three workers but two of the three had been dismissed from the firm more than a year before the petition was filed.

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[2] Defendant challenges the standing of Nelson to pursue this claim on behalf of the two other signatories of the petition. However, in conformity with section 2395 of the Trade Act of 1974, redress may be sought by "a worker, group of workers, certified or recognized union, or authorized representative of such worker or group aggrieved by a final determination of the secretary of Labor* * *," indicating that a single worker may petition this court for review as long as that worker is adversely affected. 19 U.S.C. § 2395(a); *see also, Lillian Cohen v. U.S. Secretary of Labor,* 13 CIT 762, 764 (1989)(After the Labor Department rendered a determination on the merits "a single worker has the statutory right to seek judicial review of such a determination in this Court of International Trade").

Judge Musgrave concluded that "[t]his fact alone establishes that plaintiff's petition did not satisfy the statutory mandate that petitions be filed on behalf of a group of workers." *Id.* at 4. After reviewing *Pauling,* the statute, the regulations, other prior judicial decisions and arguments of both sides, the court finds that Labor's determination is reasonable and well supported.

"If a statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron v. United States,* 467 U.S. 837, 842–43 (1983). With respect to the instant matter, the court must conclude that the Trade Act is ambiguous. Congress has not explicitly addressed whether every member of a three person group must be within the one-year filing requirement. Both the Trade Act, itself, as well as the corresponding regulations are silent regarding the question. Moreover, research reveals no helpful guidance contained in the Trade Act's legislative history to suggest a dispositive intent on this issue. Under these circumstances, when a statute is ambiguous, so long as the agency's interpretation of the statute it is charged to administer is reasonable, and does not contravene clearly discernable legislative intent, the agency's view will be sustained by the courts, even if that interpretation is not the only or most reasonable view of the statute. *Chevron,* 467 U.S. at 843 fn. 11; *Koyo Seiko Co., Ltd. v. United States,* 36 F.3d 1565, 1570 (Fed Cir. 1994).; *Former Employees of CSX Oil and Gas Corp. v. United States,* 13 CIT 645, 650, 720 F.Supp. 1002, 1007 (CIT 1989)(when contemplating the Department of Labor's interpretation of its statutory responsibilities under worker adjustment provisions of the Trade Act, the court "must accord substantial weight to an agency's interpretation [of] a statute it administers, providing it is reasonable"). The court finds that Labor's interpretation of the statute is reasonable and should therefore be upheld.

Section 2271 of the Trade Act of 1974[3] provides, among other things, that "a group of workers" may file a petition seeking certification of eligibility for assistance. While the term "group" is statutorily undefined, Labor has promulgated a regulation requiring the petition "be signed by at least three individuals of the petitioning group." 29 C.F.R. § 90.11. The court has previously endorsed such a minimum requirement, repeatedly holding that a petition signed by a lone worker:

> does not satisfy the requirements of the statute. Standing alone, Mr. Allen is not "a group of workers." Furthermore, his capacity as a millwright does not entitle him to file a petition as the group's "certified or recognized union or other duly authorized representative." 19 U.S.C. § 2271(a). Although the statute does not specify what constitutes a group of workers, in common meaning a "group"

[3] The Act states in pertinent part:

(a) A petition for a certification of eligibility to apply for adjustment assistance under this part may be filed with the Secretary of Labor * * * by a group of workers or by their certified or recognized union or other duly authorized representative.

19 U.S.C. 2271(a). Plaintiff contends that he is part of a valid group and makes no claim that he is any "other duly authorized representative."

> is not one individual and the legislative history refers to a group of at least three workers. S.Rep. No. 1298, 93rd Cong., 2d Sess. 132, *reprinted in* 1974 Code Cong. & Ad. News 7186, 7274. In addition, the applicable regulation requires the signature of three workers.

Former Employees of USX Corp. v. United States, 11 CIT 299, 301, 660 F.Supp. 961, 963 (1987); *see also, Cohen v. United States Secretary of Labor,* 13 CIT 762, 763–64 (1989)(dismissing plaintiff's claim because the petition was filed by only one lone worker on her own behalf). Thus, the law is well settled that a petition must be filed by at least three members of the group.

In the instant action three individuals signed and filed the petition. Of those three individuals, however, two were separated from their employment for more than one year prior to the filing of the petition[4]. Under section 2273(b)(1), only individuals who were separated within the year prior to the filing of the petition are eligible for certification[5]. Therefore, under the statute no persons named in a group may receive benefits if the petition filed on the group's behalf was even a single day beyond one year of their final separation. It has been noted that Congress was well aware of the rigid application of the one-year rule and apparently approved of such an application. The court, cognizant of legislative action in this area, stated:

> In considering and rejecting these numerous proposals [to relax the one-year filing requirement], Congress made it quite clear that it was aware that the one-year rule was being applied rigidly, resulting in the exclusion of entire groups of workers, as well as individuals, who were unaware of their eligibility. [citations omitted]. In light of the above, it is clear that the one-year rule standing alone, should continue to be applied according to Congress' explicit language and implicit ratifications.

Former Employees of Westmoreland v. United States, 10 CIT at 788, 650 F. Supp. at 1025.

As has been consistently held there is no possibility of waiving the one-year requirement regarding eligibility. *Lloyd v. United States Department of Labor,* 637 F.2d 1267, 1270–71 (9th Cir. 1980)(applying the one year rule "as enacted" because that best conformed with legislative intent); *United Mine Workers of America v. Brock,* 11 CIT 414, 664 F.Supp. 543, 544 (CIT 1987)(no possibility of waiver of the statutory requirement of filing within one year of separation); *Travenol Lab, Inc. v. United States,* 11 CIT 145, 146–147 (CIT 1987)("in view of the congressional purpose and history of this provision and its proposed amendments, we must apply the one year rule as it was enacted" *quoting,*

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[4] Tony Nelson, plaintiff in this action, was one of the two workers who filed more than one year after their final separation from VIC.

[5] The statute provides:

> (b) A certification under this section shall not apply to any worker whose last total or partial separation from the firm or appropriate subdivision of the firm before his application under section 2291 of this title occurred—
> (1) more than one year before the date of the petition on which such certification was granted, or
> (2) more than 6 months before the effective date of this part.

19 U.S.C. § 2273(b)(1) and(2).

Lloyd). Indeed, the court has upheld Labor's determination to deny certification to a petitioning group when each member of the group had been separated from employment more than one year prior to the filing of the petition. *Westmoreland,* 10 CIT at 787, 650 F.Supp. at 1022. Under Labor's current view of the statute, a petition filed by three workers, two of whom are ineligible for assistance, is analogous to a petition filed by merely one worker which cannot satisfy the group requirement.

Significantly, Labor's interpretation of the statute, that all three members of the petitioning group meet the one-year eligibility requirement as a prerequisite for certification, is consistent with the mandate set forth in the Trade Act. Section 2272(a) of the Trade Act states, "[t]he Secretary shall certify a group of workers as eligible to apply for adjustment assistance under this part" if all of the necessary criteria is established. Accordingly, the statute implicitly requires the Secretary to consider the group as a whole. Section 2273(a) instructs the Secretary to "determine whether the *petitioning group* meets the requirements of section 2272." 19 U.S.C. § 2273(a) (emphasis added). The statute, consequently, charges Labor with evaluating the group as a single entity rather than determining if any one individual member meets the statutory criteria. Since two of the three individuals who signed the instant petition may not be certified under any circumstances, those two individuals cannot be considered proper representatives of the petitioning group. Thus, notwithstanding the presence of three signatures on the petition, because of the absolute ineligibility of two of the three signatories, the court agrees that the petition in this case is tantamount to a petition filed by only one worker. As been previously stated, a single worker, even one who may otherwise fit the necessary criteria for assistance, may not be considered a group. *Cohen,* 13 CIT at 764. On this basis, Labor's interpretation of the Act must be sustained as reasonable.

Secondly, Labor's interpretation of the Trade Act furthers the goals of the legislature. As can be determined from the legislative history and the Court's prior analysis of the Trade Act, it is clear that Congress intended that the Secretary consider a petition only when *more* than one worker was affected: The plain language of the statute utilizes the term group as opposed to a single worker; the court has found that "group" encompasses at least three individuals; and the relevant section of the Trade Act provides for certification only if the group, not any individual single member, meets the eligibility requirements. Hence, by virtue of the terminology chosen by Congress it appears that the intent was not to consider the status of one individual within the group to establish certification, but rather to look to the eligibility of the group as a whole. To require Labor to consider whether any single individual may be qualified would thwart the very requirement that the petition be filed by a group.

Such an interpretation is further supported by the fact that Congress was unmistakably precise as to when it intended rights or benefits to pertain to a single worker under the Trade Act. *See* 19 U.S.C.

§ 2395(a)(specifying that *"a worker,* group of workers, or recognized union * * *" may seek judicial review of an adverse ruling by the Secretary)(emphasis added). "It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." *Chicago v. Environmental Defense Fund,* 114 S.Ct. 1588, 1593 (1994). When Congress articulated Labor's mandate regarding certification, it specifically used the term "group" and chose not to allow "a worker" to file a petition for certification. Under plaintiff's theory, as long as there were three signatures, the status of the individuals would be irrelevant as long as one person was not legislatively barred from being certified. This theory advanced by plaintiff simply cannot be reconciled with the plain and unambiguous intent of Congress to preclude an individual, alone, from being able to obtain certification from Labor. Congress' failure to provide for "a worker" within 19 U.S.C. § 2271(a), as it did in 19 U.S.C. § 2395, is an additional indicator that one eligible worker is not sufficient to obtain certification for "a group of workers."

Finally, plaintiff's version of the proper statutory analysis of the statutes belies his position. In attempting to explain how the statute should be interpreted, plaintiff argues:

> The Act establishes a two-tier process under which dislocated American workers can apply for trade adjustment assistance. The first requirement toward obtaining trade adjustment assistance under the Act is the initial certification by the Secretary of the eligibility of a particular *group of workers* [citations omitted].

Plaintiff's Response, p. 5 (emphasis added). By his own words, then, plaintiff concedes that the Secretary must determine the eligibility of the group as a whole, rather than discerning if any one particular worker within the group will meet the threshold requirements. Plaintiff's proffered construction is manifestly flawed. Since two of the three members of the group are not eligible for trade adjustment assistance, it cannot be said that the group is eligible.

Plaintiff next misstates the law by observing that "the statutory preclusion from benefits for individual workers who have been separated for more than a year prior to the date of the petition is not relevant to the initial certification of a group's eligibility." Plaintiff's Response, p. 5. The culmination of plaintiff's argument is that "the Secretary must first determine whether a petitioning group of workers may be certified as eligible to apply for adjustment assistance before the one year rule even become relevant." *Id.* at 6. As noted earlier, however, the court has previously upheld Labor's decision to deny certification to a group when the entire group was separated more than one year before the filing of the petition. *Westmoreland,* 10 CIT at 787, 650 F.Supp. at 1025–26. Thus, the one-year rule is relevant to the determination of initial certification and has been utilized as a basis to deny certification to a group.

Finally, plaintiff contends that "this court has expressly stated that 'to allow the Secretary to make determinations of eligibility before

accepting petitions for filing would undermine the procedural protections afforded by the statute." Plaintiff's Brief at 8, *citing, USX Corp.*, 11 CIT at 303, 660 F.Supp. at 964[6]. This statement represents a misrepresentation of the court's prior holding. Initially, in *USX Corp.*, the court again recognized the validity of Labor's determination to deny certification to a group where no members fell within the one-year requirement. *USX Corp*, 11 CIT at 302, 660 F.Supp. at 964. Such a finding further establishes that Labor acts appropriately by taking the one-year requirement into account when considering certification of a group. Moreover, the court specifically left open the question of what effect the ultimate eligibility of individual petitioning members of a group should have in filing a petition on behalf of a group. *Id.* Indeed, the concerns cited by plaintiff which were raised in *USX Corp.* regarding the propriety of the Secretary to refuse to accept petitions are inapplicable to the circumstances surrounding this case[7].

While mindful that this decision, like the holding in *Pauling*, effectively denies potential assistance to the one worker who timely files a petition for assistance, as well as any non-petitioning workers who might have been eligible, such a result is unavoidable. This finding is consistent with previous rulings affirming Labor's rejection of petitions filed on behalf of one person or by a group in which no members timely filed. *See e.g., Cohen*, 13 CIT at 763; *Westmoreland*, 10 CIT at 790, 650 F.Supp. at 1023. One person, even one potentially eligible for ultimate assistance, cannot alone overcome the requirement that the petition be filed on behalf of a group. In the case at bar, two of the three petitioning workers were separated from employment more than a year before the petition was filed. The court accepts Labor's interpretation of the Trade Act that because those individuals cannot be covered by the certification, they therefore cannot serve as representatives of the petitioning group. Since there is only one individual who could represent the petitioning group, and this court has made clear that one person fails to constitute a group of workers, the petition is invalid and certification was properly denied.

CONCLUSION

In consideration of the foregoing, the court concludes that the petition filed was invalid and therefore grants defendant's motion. Accordingly, it is ordered that this action be, and it hereby is, dismissed with prejudice.

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[6] Plaintiff mistakenly asserts that the court has never found a group to be invalid on the basis that two of its three members were legally barred from receiving assistance. In making this claim plaintiff ignores *Pauling v. Reich*, 20 CIT ___, ___ F. Supp. ___, Slip Op. 96–52 (CIT 1996), where the court made exactly that determination.

[7] In *USX Corp.* the court, without specifically passing judgment, speculated as to the propriety of allowing Labor to bar the filing of a petition based on the statute's eligibility requirements. The court noted that "[i]n most circumstances, to allow the Secretary to make determinations of eligibility before accepting petitions for filing would undermine the procedural protections afforded by the statute." *USX Corp.*, 11 CIT at 303, 660 F. Supp. at 964. However, here, those concerns are not applicable. Both in the present case, as well as in *Pauling*, Labor accepted the petition, conducted an investigation, and only then made a negative determination. In fact, there was a voluntary remand and second determination made by Labor in the instant matter. Accordingly, Labor's denial of certification based on the eligibility of the group did not in any manner impinge on the procedural rights of any petitioner.

(Slip Op. 96–120)

MUKAND LTD., PLAINTIFF *v.* UNITED STATES, DEFENDANT *v.* AL TECH SPECIALTY STEEL CORP., ET AL., DEFENDANT-INTERVENORS

Court No. 93–12–00817

[Affirmative injury determination of the United States International Trade Commission is affirmed. Plaintiff's challenges are dismissed. Judgment entered for defendant.]

(Dated August 2, 1996)

O'Melveny & Myers (Craig L. McKee, Michael A. Meyer, Gary N. Horlick), for plaintiff.
Lyn M. Schlitt, General Counsel; *James A. Toupin,* Assistant General Counsel, United States International Trade Commission *(Shara L. Aranoff),* for defendant.
Collier, Shannon, Rill & Scott (David A. Hartquist, Laurence J. Lasoff, Robin H. Gilbert, Lynn E. Duffy), for defendant-intervenors.

MEMORANDUM OPINION

GOLDBERG, *Judge:* Plaintiff Mukand, Ltd. ("Mukand") commenced this action under 19 U.S.C. § 1516a(b)(1)(B) (1988), challenging the United States International Trade Commission's ("Commission") final affirmative injury determination in the antidumping investigation of stainless steel wire rod from India. *Stainless Steel Wire Rod from India,* USITC Pub. 2704, Inv. No. 731–TA–638 (Final) (Nov. 1993) *("Commission's Final Determination").* The Court exercises jurisdiction pursuant to 28 U.S.C. § 1581(c) (1988) and affirms the *Commission's Final Determination.*

I. BACKGROUND

On December 30, 1992, several domestic stainless steel wire rod producers filed a petition with the Commission alleging that the stainless steel wire rod industry in the United States was materially injured by imports of wire rod from Brazil, France, and India that were being sold at less than fair value. On December 1, 1993, the Commission published its final determination finding material injury by reason of imports from India. On December 20, 1993, Mukand initiated this action challenging the *Commission's Final Determination.*

II. DISCUSSION

In deciding a motion for judgment on the agency record, the Court analyzes whether Commerce's determination is supported by substantial evidence, and is otherwise in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B) (1988). "Substantial evidence is something more than a 'mere scintilla,' and must be enough reasonably to support a conclusion." *Ceramica Regiomontana, S.A. v. United States,* 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986) (citations omitted), *aff'd,* 5 Fed. Cir. (T) 77, 810 F.2d 1137 (1987). In applying this standard, the Court affirms agency determinations that are reasonable and supported by the record when considered as a whole, even though there may be evidence that

detracts from the agency's conclusions. *Atlantic Sugar, Ltd. v. United States,* 2 Fed. Cir. (T) 130, 138, 744 F.2d 1556, 1563 (1984).

A. *Competition Determination:*

The Court finds that substantial evidence supports the Commission's determination that there is competition between Indian wire rod and domestic wire rod, particularly for low end uses. The record supports a finding that Indian wire rod is low-priced, in part due to its low quality, and is used in place of domestic wire rod for applications in which quality is not critical. *See* Commission Staff Report, INV-Q–182 at I–8 ("Report"); Economics Memorandum, EC-Q–115 at 8 ("Economics Memorandum"). Based upon sales figures, interviews, survey responses, and research prepared by its staff, the Commission reasonably concluded that Indian wire rod displaced domestic wire rod for low end applications. This suggests that the two compete. Accordingly, the Court finds that the Commission's finding of competition is supported by substantial evidence.

Mukand makes two challenges to the Commission's general conclusion that Indian wire rod competes with domestic wire rod.

1. *Sales by Grade and Dimension:*

Mukand objects to the Commission's method of analyzing competition by categorizing wire rod imports into five standard product types based upon grade and dimension, and then comparing total sales of Indian wire rod in a particular category against the total sales of domestic producers for each category. Using this method, the Commission found that competition existed because both the domestic and Indian producers recorded sales of all five product types in the United States. *Commission's Final Determination* at I–16 (citing Report at I–30 to I–33).

Mukand argues that this method is misleading because significant variation exists within any particular grade, and these variations dictate what uses the wire rod can actually serve. Mukand also argues that the Commission's reliance on this evidence is inappropriate because there is only a minimal degree of overlap of competition. These arguments are considered in turn.

The Commission has broad discretion in choosing which methodology it will employ to analyze data. *Cemex v. United States,* 16 CIT 251, 255–6, 790 F. Supp. 290, 294–5 (1992). In this case, the Commission utilized a method which withstood review by the Court in *Granges Metallverken AB v. United States,* 13 CIT 471, 716 F. Supp. 17 (1989). In *Granges,* Swedish brass was found to compete with the domestic like product based partly on sales data showing that Swedish imports were sold in three of nine standard product categories defined by such factors as alloy, gauge, and width.

Mukand argues that *Granges* does not apply to the present case because the quality of its wire rod differs so widely within each of the Commission's categories that it cannot be grouped successfully into standard categories. This argument fails. In *Granges,* the Swedish brass

under investigation was custom made for purchasers' needs, which did not prevent grouping the brass into categories, and then using those categories to assess competition. Some variation in the imported product does not prevent the Commission from using sales by grade as evidence of competition. In general, an analysis based on standard categories is an appropriate method for the Commission to employ.

Mukand argues, however, that when there are such great variances in the quality of the imported product, that the available end uses of the product are affected, successful categorization of the product is prevented. The Court agrees that where the use of standard categories over-simplifies and misrepresents the nature of competition in the market, rigid categories should be abandoned in favor of more direct analysis.

In the present case, the Commission categorized wire rod using "grades," which are defined by a number of factors,[1] rather than strictly applying levels of quality,[2] which is the critical factor in assessing Indian wire penetration into the domestic wire rod market. Thus, the Commission presents only an incomplete analysis of quality, and does not provide the most accurate picture of competition in the wire rod market.

Although the Commission's analysis is awkward, in that it attempts to neatly segment the market by grades, its conclusion is not in error. The Court reviews decisions based upon the entire record. As discussed above, the record does demonstrate that Indian wire rod displaced domestic rod in the low end of the market where quality is not critical. The Court finds, therefore, that the Commission demonstrated competition between domestic and imported wire rod.

Mukand argues, however, that even if competition does exist, it has little impact. The Commission relied upon several types of evidence in determining that there was an overlap of sales by grade and dimension. One type was statistics provided by Mukand. These statistics show substantial overlap in sales, broken down by grade and dimension, especially in grade AISI 304 and dimensions of less than six millimeters in diameter. For example, [ ] of Indian imports are of AISI 304. For domestic producers, the corresponding figures for the same product expressed as a percentage of production are [ ]. *Commission's Final Determination* at I–16 n.87 (citing data contained in briefs). Industry data also showed significant market penetration by Indian wire rod. According to the Commission, the volume of imports from India rose from only 97 short tons in 1990 to 4,344 tons in 1992. *Commission's Final Determination* at I–19.

Additionally, the Commission supplemented its statistical analysis with Mukand's own responses to Commissioner Watson's questions regarding end use. In those responses, Mukand admitted some overlap

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[1] The factors include cross-sectional shape and diameter, grain size, hardening capabilities, heat resistance, electric resistance, and magnetic permeability. *Commission's Final Determination* at I–7.

[2] The type of quality referred to here is that which would be measured by the *frequency* that the grade sold would match the standard for that grade. In other words, how often the grade sold would be capable of the same end uses as other product of the same grade.

of sales. Taken as a whole, the statistical analysis and the responses could reasonably support a finding that Indian and domestic product sales overlap, thereby supporting the Commission's finding of competition. Therefore, the Court affirms this aspect of the Commission's determination.

2. *Price:*

Mukand argues that the Commission's reliance upon evidence that purchasers made their decision based on price was improper. More specifically, Mukand objects to the Commission's reliance upon letters from two domestic producers. Mukand claims that the authors of these letters lacked personal knowledge of the subject matter.

The Court notes that the Commission, as the trier of fact, has considerable discretion in weighing the probative value and relevance of evidence. *Iwatsu Elec. Co. v. United States,* 15 CIT 44, 56, 758 F. Supp. 1506, 1517 (1991).

The Commission relied on two letters, one from Al Tech Specialty Steel Corporation ("Al Tech"), and one from Carpenter Technology Corporation ("Carpenter"). The Commission found, partly on the basis of the letters, that by the end of the period of investigation low-priced Indian imports had displaced domestic sales at the low end of the market. *Commission's Final Determination* at I–19 n.119.

The AL Tech letter was written by James Mintun, Jr., Al Tech's Vice Chairman. He states that markets previously served by Al Tech and Armco such as lashing wire, tire wire, and nail wire have been lost, primarily to India, because "dumped India prices allow the redrawers to improve their margins." Def.'s Non-confid. Opp'n to Pl.'s Mot. for J. Agency R., 44.

It is true that Mr. Mintun is not qualified to assess either that the Indian product was "dumped," a legal determination, or the reasons why redrawers purchase Indian wire. However, these are not the points upon which the Commission relied. The Commission used this letter to show that Al Tech previously had served this market, and that sales were lost to Indian imports. Because Mr. Mintun's position affords him knowledge of his customers' purchasing habits, the Commission could reasonably rely upon Mr. Mintun's letter for these points.

Similarly, William J. Pendleton, the Director of Corporate Affairs at Carpenter, wrote a letter claiming that his company was forced out of the "so-called 'low end' of the market" by lower-priced Indian imports. In Pendleton's letter, he asserts that Indian wire rod is of low quality. *Id.* at 44–5.

Mukand raises two arguments with respect to Pendleton's letter. First, Mukand claims that evidence on the record shows that Carpenter has reported lost sales and revenues only to French wire rod, and not Indian wire rod. Second, Mukand claims that Pendleton has no personal knowledge of the quality of Indian wire rod. The Court finds these arguments unpersuasive.

The Commission relied upon Pendleton's letter for evidence that a domestic producer was forced out of the low end of the market. If there is evidence that Carpenter previously reported French wire rod as the cause of its lost sales and revenues, then the Commission, as the trier of fact, was entitled to weigh the probative value of this letter. With respect to Mukand's second objection, the Commission did not rely upon Pendleton's letter to support any quality analysis.

The Court notes that in finding that Indian and domestic wire rod compete on the basis of price, the Commission also evaluated purchasers' survey responses. Several purchasers listed price as their primary or secondary consideration when ranking the major factors involved in their decision to buy. *Commission's Final Determination* at II–29. This evidence suggests that a number of purchasers obtained price quotes, both from importers and domestic producers, and made their purchasing decisions mainly on the basis of price. *Commission's Final Determination* at I–16, 17.

The record demonstrates that one of the primary advantages of Indian wire rod is its price. It was therefore reasonable for the Commission to assess the importance of price in its competition determination. The use of letters, surveys, and other information gathered from participants in the wire rod industry is appropriate to make this determination. The Commission is empowered as finder of fact to weigh the credibility of this evidence. The Court holds that the Commission's determination of competition on the basis of price is supported by substantial evidence and affirms the Commission's determination in this respect.

B. *Fungibility Determination:*

In determining that the domestic wire rod industry was injured, the Commission assessed the effects of Indian imports both separately and cumulatively with those of France and Brazil. Cumulation is mandatory where the Commission makes a finding of material injury. 19 U.S.C. § 1677 (7) (C) (iv) (1988 & Supp. IV 1992). To determine what imports to cumulate, it is necessary to assess which imports compete with domestic like product. The competition finding is based upon a four factor analysis:

> (1) the degree of fungibility between the imports from different countries and the domestic like product, including consideration of specific customer requirements and other related questions;
>
> (2) the presence of sales or offers to sell in the same geographical markets of imports from different countries and the domestic like product;
>
> (3) the existence of common or similar channels of distribution for imports from different countries and the domestic like product; and
>
> (4) whether the imports are simultaneously present in the market.

Certain Cast-Iron Pipe Fittings from Brazil, the Republic of Korea, and Taiwan, Inv. Nos. 731–TA–278–280 (Final), USITC Pub. 1845 (May 1986), *aff'd, Fundicao Tupy S.A. v. United States,* 12 CIT 6, 9–10, 678 F. Supp. 898, 902, *aff'd* 7 Fed. Cir. (T) 9, 859 F.2d 915 (1988). Mukand concedes the latter three factors, but it makes several challenges to the Commission's determination of fungibility.

1. *Survey Responses:*

Plaintiff objects to the Commission's fungibility finding on the grounds that it is based in part upon a flawed survey. According to Mukand, the Commission should not have relied on a survey that asked purchasers whether Indian and domestic wire rod were "interchangeable" where the word "interchangeable" was never defined in the survey. Mukand claims that the survey responses do not necessarily indicate whether imports can serve the same end uses, and therefore do not establish whether imports are market substitutes or fungible.

The Commission evaluated the survey responses of fourteen purchasers. Ten of these purchasers claimed that Indian and domestic wire rod are interchangeable. The Commission analyzed these responses as follows: "[a]lthough many perceived some quality differences between the various imports and the domestic product, purchasers responding to the Commission's questionnaire indicated that Brazilian, French and Indian imports respectively were nonetheless interchangeable with the domestic product, and that they purchased them for the same end uses." *Commission's Final Determination* at I–16 (citations omitted).

The Court notes that in making its fungibility determination, the Commission also relied, in part, upon economic analysis prepared by its staff. As part of its research, the Commission's economic staff analyzed the same survey responses. This analysis showed that Indian wire rod and domestic wire rod were sold to the same customers for similar uses, were purchased for the production of similar products, and share a common presence in certain market applications despite differences in quality. Economics Memorandum at 21. In particular, the Court notes that the economics staff indicated that they based their analysis on a number of specific survey questions concerning product quality and differentiation to reveal purchasers' actual buying practices. *Id.*

The Court reviews the Commission's determination based upon the entire evidentiary record. Although the Court shares Mukand's concerns that the survey should have defined the term "interchangeable," the Commission acted reasonably in relying upon the survey. Both the Commission's own analysis of the survey and the analysis of its economics staff provide substantial evidence that the information contained in the survey responses was reliable. The Court therefore upholds this aspect of the Commission's fungibility determination.

2. *Quality Differential:*

Next, Mukand challenges the Commission's fungibility determination on the grounds that Indian wire rod is of such poor quality, relative to domestic rod, that Indian and domestic wire rod cannot be used for

the same applications. The Court notes that Mukand raised a similar argument with respect to the Commission's overall finding of competition. For similar reasons, the Court rejects Mukand's fungibility argument.

Evidence on the administrative record supports a finding that there is some degree of fungibility between Indian wire rod and domestic wire rod. The record demonstrates that the Indian product is generally viewed in the market as being of comparatively low quality, Economics Memorandum at 19–20, and that its main advantage is its low price. Staff Report at I–53–4, I–72. The record shows that end users chose Indian wire rod over domestic wire rod for low end uses in which quality was not critical. Economics Memorandum at 19–20. To the extent that domestic and Indian wire rod can accomplish the same low end uses on a commercially practicable basis, Indian wire rod is fungible with these other products. The actual displacement of domestic wire rod by Indian wire rod is evidence that these products are fungible at the low end of the wire rod market.

In applying the four factor analysis, the Commission need not find a "complete overlap" of competition, but merely a "reasonable overlap" in order to cumulate imports. *Wieland Werke, AG v. United States,* 13 CIT 561, 563, 718 F. Supp. 50, 52 (1989). Because the Commission may base its finding upon a reasonable overlap of competition, it follows that the Commission need only find a reasonable overlap of fungibility to support its competition finding.

The Court finds that differences in quality do not prevent Indian and domestic wire rod from being considered fungible.

3. *Same Customers:*

In analyzing fungibility, the Commission considered evidence that the same customers bought both Indian and domestic wire rod. Mukand's final argument is that sales to the same customers does not indicate fungibility. Mukand claims that due to Indian wire rod's low quality, the same customer may purchase Indian and domestic wire rod for different end uses.

A similar argument was made in *Wieland Werke.* 13 CIT at 565, 718 F. Supp. at 53–54. In that case, the importer of West German brass argued that sales to similar customers did not indicate competition because customers purchased each country's imported product for different uses—German products were purchased for high-quality or specialty uses, and all other imports for less critical uses. The Court in *Wieland Werke* rejected this argument because it found that purchasers made purchasing decisions based on price as well as on quality. *See Wieland Werke* 13 CIT at 565, 718 F. Supp. at 54.

The Court similarly rejects Mukand's argument. In the wire rod market, purchasers may choose between different products, each presenting different combinations of price and quality. A purchaser may select Indian wire rod over its domestic counterpart for applications which do not require high quality inputs, in order to take advantage of Indian

wire rod's low price. However, the very same purchaser may purchase domestic wire rod for higher end applications. As stated above, to the extent that domestic, or other wire rod, can also accomplish these low end uses, Indian wire rod is fungible with these other products. Under these circumstances, the Commission's analysis that Indian and domestic product were sold to similar purchasers may reasonably be taken to indicate competition among these products. The Court therefore upholds the Commission's analysis.

III. CONCLUSION

The Court finds that quality differences between Indian stainless steel wire rod and the domestic like product are not so pronounced as to prevent a reasonable overlap of competition between them. Consequently, the Court holds that the Commission's cumulation of Indian imports with those of other subject countries and their finding of competition are both supported by substantial evidence and are otherwise in accordance with the law. Judgment will be entered accordingly.

(Slip Op. 96–121)

AMERICAN HI-FI INTERNATIONAL, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 94–01–00016

[Defendant's motion for summary judgment is granted.]

(Dated August 2, 1996)

Glad & Ferguson (T. Randolph Ferguson and *John M. Daley)* for plaintiff.

Frank W. Hunger, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Jeffrey M. Telep), David Ross,* Office of the Chief Counsel for Import Administration, United States Department of Commerce, *Chi S. Choy,* Office of the Assistant Chief Counsel, United States Customs Service, of counsel, for defendant.

OPINION

RESTANI, *Judge:* This matter is before the court on a motion for summary judgment by plaintiff American Hi-Fi International, Inc. ("American Hi-Fi") pursuant to USCIT Rule 56(a), contending that the United States Customs Service ("Customs") erroneously liquidated its entries with an assessment of interest on the underpayment of antidumping duties. The government cross-moves for summary judgment pursuant to USCIT Rule 56(b), asserting that (1) this court lacks jurisdiction to entertain this action, and (2) neither Customs nor the United States Department of Commerce ("Commerce") erred in assessing interest on plaintiff's underpayment of antidumping duties. In the alternative,

defendant requests an order setting forth the facts that appear without substantial controversy pursuant to USCIT Rule 56(e).

BACKGROUND

In 1971, when the United States Department of the Treasury ("Treasury") was responsible for administration of antidumping law, Treasury conducted a less than fair value investigation of television receivers from Japan pursuant to the Antidumping Act of 1921 ("the 1921 Act"). Treasury published its affirmative dumping finding on March 10, 1971, concluding that television receivers from Japan were being, or were likely to be, sold at less than fair value. *Television Receiving Sets, Monochrome and Color, From Japan,* 36 Fed. Reg. 4597 (Dep't Treas. 1971) ("1971 Dumping Finding"). The U.S. Tariff Commission determined that an industry in the United States was being injured by reason of the importation of television receivers from Japan sold at less than fair value. *Television Receiving Sets From Japan Causing Injury,* 36 Fed. Reg. 4576 (U.S. Tariff Comm'n 1971).

The 1921 Act contained no provision for the calculation or payment of estimated antidumping duties or for the imposition of interest. It contained only a provision requiring an exporter to post a bond with sureties approved by the appropriate Customs district director in an amount equal to the estimated value of the merchandise, under regulations prescribed by Treasury. Antidumping Act of 1921, Pub. L. No. 10, § 208, 42 Stat. 9, 14 (1921).

Congress then enacted the Trade Agreements Act of 1979 ("the 1979 Act"), which repealed the 1921 Act and established new administrative procedures for the administration of antidumping law. Trade Agreements Act of 1979, Pub. L. No. 96–36, 93 Stat. 144 (1979) (codified as amended in scattered sections of 19 U.S.C.). In 1980, Commerce replaced Treasury as the administering authority of the antidumping law. The 1979 Act provided for the payment of estimated antidumping duties upon entry of merchandise subject to dumping orders and findings and for the payment of interest upon underpayments and overpayments of amounts deposited on merchandise entered. *See* 19 U.S.C. §§ 1673e(a)(3), 1677g(a) (1988). On January 4, 1980, Treasury announced Commerce's decision that, "prior to completion of the first administrative review under [19 U.S.C. § 1675], merchandise subject to a finding of dumping in effect on January 1, 1980, may continue to be entered under bond or other security." *Antidumping; Treatment of Merchandise Subject to a Finding of Dumping in Effect on January 1, 1980,* 45 Fed. Reg. 1084 (Dep't Treas. 1980). Accordingly, importers subject to Treasury's dumping findings were not required to deposit cash for estimated antidumping duties prior to the completion of the first administrative review.

In 1981, Commerce concluded its first administrative review of the 1971 Dumping Finding pursuant to 19 U.S.C. § 1675(a). *Television Receiving Sets, Monochrome and Color, From Japan,* 46 Fed. Reg. 30,163 (Dep't Comm. 1981) (final results). The final results of this

review established, for the first time, the cash deposit rates for estimated antidumping duties for specific manufacturers. *Id.* at 30,166. For televisions manufactured by Toshiba (those imported by plaintiff), there were no deposits required because no dumping margin was found for Toshiba. *Id.*

On June 10, 1985, Commerce published the final results of the second administrative review of the 1971 Dumping Finding. *Television Receiving Sets, Monochrome and Color, From Japan,* 50 Fed. Reg. 24,278 (Dep't Comm. 1985) (final results). Again, the cash deposits were not required for televisions manufactured by Toshiba. *Id.* at 24,283. In its final results, Commerce stated:

> As provided for in [19 C.F.R. § 353.48(b)], a cash deposit of estimated antidumping duties based on the above margins shall be required for these firms [Toshiba—zero]. Since the weighted average margins for Hitachi, Nissei Sanyo, and Victor are less than 0.50 percent and, therefore, *de minimis* for cash deposit purposes, the Department shall waive the deposit requirements for shipments of television receiving sets from those firms * * *. These deposit requirements and waivers are effective for all shipments entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice, and shall remain in effect until publication of the final results of the next administrative review.

Id.

On August 16 and 18, 1986, plaintiff made two entries of television receivers manufactured by Toshiba in Japan (Consumption Entry Nos. 397–86–963482–4 and 397–86–963485–3). On receipt of plaintiff's entry papers, Customs specifically rejected Entry No. 86–963482–4 for failure to state that the entry was subject to case number A588–015–013, that is, the 1971 Dumping Finding. Customs requested an extra copy of the invoice for antidumping purposes and additional information from plaintiff about its televisions so that Customs could determine whether they were subject to antidumping duties.

On April 28, 1989, Commerce published a notice of initiation of antidumping administrative review of television receivers from Japan manufactured by Toshiba imported between March 1, 1986 and February 28, 1987. *Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 54 Fed. Reg. 18,320, 18,322 (Dep't Comm. 1989). Commerce conducted its administrative review and published its final results on February 11, 1991. *Television Receivers, Monochrome and Color, from Japan,* 56 Fed. Reg. 5392 (Dep't Comm. 1991) (final results). Commerce stated that, "[a]s a result of the comments received and the correction of certain clerical errors, we have revised our preliminary results for Fujitsu General, Hitachi, Matsushita, Mitsubishi, NEC, Sanyo, Toshiba, and Victor." *Id.* at 5401. Commerce determined that televisions manufactured by Toshiba and imported between March 1, 1986 and February 28, 1987 were subject to antidumping duties in the amount of 35.40% *ad valorem. Id.*

Subsequently, Commerce sent liquidation instructions to Customs, which were then forwarded on July 26, 1991 to all Customs district directors, import specialists, Customs brokers, and interested parties. According to these instructions, Commerce directed Customs to liquidate entries of televisions subject to the dumping ordered entered between March 1, 1986 and February 28, 1987 and as follows:

> The assessment of antidumping duties by the Customs Service is subject to the provisions of [19 U.S.C. § 1677g], which requires *interest on overpayments or underpayments of the amount deposited as estimated antidumping duties.* The rate at which such interest is payable is the rate in effect under section 6621 of the Internal Revenue Code of 1954 for such period. Interest shall be calculated from the date of payment of estimated duties through the date of liquidation.

Liquidation Instructions, App. to Def.'s Cross-Mot. for Summ. J., Ex. 8, at 3, 7 (emphasis added). On October 11, 1991, Customs liquidated plaintiff's entries with the assessment of antidumping duties and interest. On January 6, 1992, plaintiff filed administrative protests with Customs contesting the imposition of antidumping duties and interest. Customs denied the protest.

On July 6, 1994, plaintiff filed an action challenging (1) the assessment of antidumping duties on plaintiff's entries, and (2) the assessment of interest on July 6, 1994. Plaintiff alleged jurisdiction pursuant to 28 U.S.C. § 1581(a) and alternatively, 28 U.S.C. § 1581(i). This court held that it had jurisdiction over this matter pursuant to 28 U.S.C. § 1581(a) and granted defendant's motion to dismiss as to Count 1, but denied it as to Count 2. *American Hi-Fi Int'l, Inc. v. United States,* Slip Op. 95–182, at 12 (Ct. Int'l Trade Nov. 16, 1995).

DISCUSSION

Defendant contends that the court lacks jurisdiction over this matter pursuant to 28 U.S.C. § 1581(a)[1] as Commerce, not Customs, made the contested decision to assess interest on plaintiff's underpayment of antidumping duties. Defendant argues that had plaintiff properly raised the issue to Commerce during its 1991 administrative review, jurisdiction would lie under 28 U.S.C. § 1581(c).[2] In a previous opinion denying defendant's motion to dismiss, the court discussed the respective roles of Commerce and Customs in the assessment of antidumping duties and interest on the underpayment of those duties. *See* Slip Op. 95–182, at 4–6. The court noted that the question of whether jurisdiction under § 1581(a) was proper turned on which agency made the contested decision. *Id.* at 7. The court examined plaintiff's claim and found that it had jurisdiction under § 1581(a) because Customs appeared to

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[1] Section 1581(a), Title 28, United States Code provides that the court, "shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under [19 U.S.C. § 1515]." 28 U.S.C. § 1581(a) (1988). Section 1515, Title 19, United States Code provides for review of a protest by the appropriate customs officer filed in accordance with 19 U.S.C. § 1514. 19 U.S.C. § 1515 (1988).

[2] Section 1581(c), Title 28, United States Code provides that the court "shall have exclusive jurisdiction of any civil action commenced under [19 U.S.C. § 1516a]." 28 U.S.C. § 1581(c) (1988). Section 1516a, Title 19, United States Code provides for judicial review of antidumping duty determinations. *See* 19 U.S.C. § 1516a (1988).

have made the decision to assess interest on plaintiff's bond. *Id.* at 11–12. The court noted that defendant "has not cited specific Commerce regulations or specific instructions from Commerce applicable to plaintiff's entries requiring cash deposits if the weighted average dumping margin is less than 0.50 percent, as was the margin for the Toshiba televisions involved in plaintiff's entries." *Id.* at 9. The court also stated that defendant failed to distinguish *Timken Co. v. United States*, 15 CIT 526, 777 F. Supp. 20 (1991), *aff'd*, 37 F.3d 1470 (Fed. Cir. 1994), from the present case and did not respond to plaintiff's citation of Treasury Decision 85–145, which seemed to provide that Customs, in its discretion, may accept a continuous basic importation and entry bond when the amount of estimated antidumping duties are less than 5 percent *ad valorem*. Slip Op. 95–182, at 10. Defendant now seeks to remedy these omissions, as it may. Subject matter jurisdiction may be raised at any time.

It is undisputed that plaintiff did not make a cash deposit at the time of entry and instead posted a continuous importation and entry bond. *Id.* at 7. In its liquidation instructions, Commerce directed Customs to assess interest pursuant to 19 U.S.C. § 1677g, which provides that:

> Interest shall be payable on overpayments and *underpayments of amounts deposited* on merchandise entered, or withdrawn from warehouse, for consumption on and after—
>
> (1) the date of publication of a[n] * * * antidumping duty order under this subtitle or section 1303 of this title, or
>
> (2) the date of a finding under the Antidumping Act, 1921.

19 U.S.C. § 1677g(a) (1988) (emphasis added). Defendant contends that once so instructed by Commerce, Customs performs merely a ministerial task in assessing interest on an importer's underpayment of estimated antidumping duties.

Defendant asserts that it is the *requirement* of a cash deposit if there is a positive estimated margin that triggers the assessment of interest, not the actual tender of a cash deposit which, given the cash deposit rate of zero, plaintiff was not required to make. In *Timken,* Commerce did not assess interest on entries of importers who did not make cash deposits of estimated antidumping duties but instead were permitted to post bonds to secure potential liabilities arising from a Treasury dumping finding. *Timken,* 15 CIT at 527–28, 777 F. Supp. at 22. The court upheld Commerce's interpretation of 19 U.S.C. § 1677g that, "'amounts deposited' refer only to cash deposits of estimated antidumping duties upon entry and not to other kinds of security such as a bond," as reasonable in light of the legislative history, the change in legislation, and Congress' intent. *Id.* at 532–33, 777 F. Supp. at 25–26. Defendant attempts to distinguish *Timken* from the instant case, arguing that at the time of entry of the merchandise in *Timken,* Commerce had not yet published its first administrative review of the dumping finding establishing reliable estimates of dumping, and for that reason, permitted respondents to continue to post bonds to secure payment in place of cash deposits. Plaintiff's entries here were subject to a 1971 Dumping Finding under

the 1921 Act, which did not require cash deposits of estimated antidumping duties. The *Timken* finding was under the same prior act. Two subsequent administrative reviews by Commerce, however, set cash deposit rates for covered televisions, although the stated rate for Toshiba televisions was zero. Defendant argues that because plaintiff's goods were subject to a "zero cash deposit rate," interest may be assessed on the underpayment of the actual antidumping duties assessed, which was 35.4% *ad valorem* pursuant to the 1991 administrative review. Defendant places emphasis on the court's language in *Timken* stating, "the requirement to make cash deposits of estimated duties, under the duty order, triggers the interest provision. Without the duty order, the importer has no obligation to make a cash deposit and consequently no obligation to pay interest." *Timken,* 37 F.3d at 1477. Defendant claims that once plaintiff became obligated to make a cash deposit, if any margin were to be found, it became liable for interest even though the required amount of the deposit was zero in this instance.

Defendant thus argues that jurisdiction lies pursuant to 28 U.S.C. § 1581(c) as Commerce, not Customs, made the decision to require cash deposits of estimated antidumping duties through its review determination, which triggered the imposition of interest on plaintiff's underpayment of such duties. Whatever the merits of the distinguishment of *Timken* presented here, Commerce did not make it known publicly before the final determination such that the issue could be challenged under 28 U.S.C. § 1581(c). The Court of Appeals for the Federal Circuit in *Timken* stated:

> [t]he "amounts deposited" term of section 1677g(a) thus refers to a deposit of estimated duties. Section 1673e(c) clearly separates bonds or other securities from "deposit[s] of estimated antidumping duties." Accordingly, "amounts deposited" in section 1677g(a) refers solely to cash deposits of estimated duties provided under sections 1671e(a)(4) and 1673e(a)(3). Section 1677g(a)'s "amounts deposited" language does not encompass bonds.

37 F.3d at 1476. Given the statute's reference to "amounts deposited" and the language in *Timken* interpreting that term, the court finds that at the time of the administrative review and until interest was demanded at liquidation, plaintiff did not have fair notice that interest would be assessed on entries made with, at most, a continuous entry bond as security. Defendant claims that plaintiff had adequate notice that it may be subject to antidumping duties and interest on the underpayment of such duties because plaintiff was asked by Customs to refile an entry form to indicate that plaintiff's merchandise was subject to the 1971 Dumping Finding. While the court agrees that plaintiff had notice as to its possible liability for antidumping duties, the court finds that plaintiff did not have timely notice of its liability for interest. Accordingly, jurisdiction under 28 U.S.C. § 1581(c) providing review for a challenge to the administrative review determination was not available to plaintiff.

As 28 U.S.C. § 1581(c) did not provide an adequate remedy, and plaintiff did not voluntarily forego this remedy, plaintiff could challenge Commerce's determination as soon as it was made aware of it under 28 U.S.C. § 1581(i).[3] The court notes, however, that for relief to be available under § 1581(i) at the time of liquidation, Commerce would have had to instruct Customs to assess interest on plaintiff's entries in some unequivocable way so that plaintiff could know that Commerce was making a determination adverse to plaintiff, rather than what could reasonably be interpreted as Customs' failure to obey Commerce's instructions to assess interest on underpayments of *amounts deposited.*

Jurisdiction for actions challenging Customs' failure to follow Commerce's actual liquidation instructions (Commerce's private intentions would appear irrelevant on this point) is found under 28 U.S.C. § 1581(a). *See American Hi-Fi,* Slip Op. 95–182, at 3–5. *Cf. Nichimen America, Inc. v. United States,* 938 F.2d 1286, 1292 (Fed. Cir. 1991) (Customs' decision protestable even though affecting antidumping duties).

In addition, at some point a cause of action arose that would be subject to jurisdiction under 28 U.S.C. § 1581(i). That is, as 28 U.S.C. § 1581(c) was manifestly inadequate, under 28 U.S.C. § 1581(i) the court could determine if Commerce's instruction to Customs, whatever it is construed to mean, was correct. Defendant did not plead the statute of limitations as a defense to a cause of action under 28 U.S.C. § 1581(i). The court will assume for the sake of argument, however, that defendant could renew its motion to dismiss once again, arguing that an agent of the United States may not waive such a defect. Assuming, *arguendo,* that to be the case, the court would find that a cause of action challenging a determination does not accrue until the determination is made known. *St. Paul Fire & Marine Ins. Co. v. United States,* 959 F.2d 960, 964 (Fed. Cir. 1992) (stating "a claim does not accrue until the aggrieved party reasonably should have known about the existence of the claim"). As indicated, no evidence was produced indicating Commerce had made such a determination public at the time of liquidation or at any time prior to two years before this action was commenced. *See* 28 U.S.C. § 2636(h) (28 U.S.C. § 1581(i) action barred unless commenced within two years after the cause of action first accrues).

The court now turns to whether Custom's assessment of interest on plaintiff's entries was proper. That is, what did the liquidation instruction mean and what does 19 U.S.C. § 1677(g) require? As indicated, plaintiff alleges that interest may not be collected when goods are entered under bond and without cash deposits, citing *Timken.* In this case, Customs treated plaintiff's continuous entry bond as security for antidumping duties as follows: (1) plaintiff was allowed to enter its merchandise without making a cash deposit because it was assigned no positive estimated antidumping duty amount and (2) Customs later made a

[3] Section 1581(i)(4), Title 28, United States Code provides in relevant part that the court "shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for— administration and enforcement with respect to the matters referred to in * * * subsections (a)–(h) of this section." 28 U.S.C. § 1581(i)(4) (1988).

demand upon the bond for payment of antidumping duties and interest eventually assessed on those duties. *See* Pl.'s Reply to Def.'s Opp'n to Mot. For Summ. J., Ex. C (Formal Demand on Surety for Payment of Delinquent Amounts Due). Furthermore, plaintiff cites an agreement between Commerce and Customs, entitled, "Memorandum of Agreement Between [Commerce] and [Customs] Concerning Acceptable Security For Release of Merchandise Subject to Antidumping and Countervailing Duty Proceedings," *reprinted in* Treasury Decision 85–145 ("T.D. 85–145"), which appears to allow Customs, at its discretion, to accept a continuous importation and entry bond as security for estimated antidumping duties when the estimated antidumping duties are less than 5 percent *ad valorem*. The decision provides in relevant part:

> Unless specifically instructed by the Secretary of Commerce or a designee to accept another form of security or a cash deposit for estimated duties, the U.S. Customs Service may accept, at its discretion, any one of the following forms of security for payment of estimated antidumping or countervailing duties, or both, on merchandise entered for consumption in the United States:
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> * * * * * * *
>
> (3) If the amount of the estimated antidumping or countervailing duty is less than 5 percent *ad valorem* (or the equivalent), a continuous basic importation and entry bond, as described in 19 C.F.R. 113.62, in an amount sufficient to cover the amount of the estimated antidumping or countervailing duty, or both, determined by the Secretary of Commerce, and all other entry bonding requirement; * * *.

T.D. 85–145, *reprinted in* 19 Cust. B. & Dec. 331, 332 (1985).

Defendant argues, however, that Customs had no authority to accept plaintiff's continuous importation and entry bond as security for estimated antidumping duties as a bond cannot provide such security and that plaintiff's reliance on T.D. 85–145 is misplaced. Defendant claims that the language of the agreement clearly makes bonds inappropriate as security for estimated antidumping duties when Commerce instructs Customs to require a cash deposit. Defendant claims that Customs was specifically instructed by Commerce to accept only a cash deposit for estimated duties and thus, was not allowed to accept a bond as security for estimated or, we presume, potential antidumping duties. The instruction, of course, contains no specific instruction on security if cash is not deposited because the estimated rate is zero. The instruction simply mirrors the statute, 19 U.S.C. § 1677g. Thus, the issue remains, does that statute require interest if a dumping margin is not yet found for particular goods, but a duty order or its equivalent is outstanding?

As found in *Timken,* the statute is not clear on its face. *Timken,* 37 F.3d at 1474. The statute can only be understood in the context of the entire statutory scheme. *Id. Timken* was concerned with goods entered before a Commerce antidumping duty order requiring cash deposits is issued. The goods there were entered with only a Treasury finding outstanding under which only bonds were required. While *Timken* empha-

sized that the goods there were entered under bond and "amounts deposited" means cash deposits, it also states that "[w]ithout the duty order" there is "no obligation to pay interest." *Id.* at 1477. *Timken* did not address the issue of interest for goods entered with a zero rate after a Commerce dumping order is issued and cash deposits are required for all goods with more than *de minimis* margins of dumping.

The intention of Congress in requiring interest on "underpayment of amounts deposited" in 19 U.S.C. § 1677g, as recognized in *Timken,* was to require interest on underpayments of dumping duties after Commerce issues a duty order,[4] except in certain limited cases not present here.[5] *Timken,* 37 F.3d at 1476–77. Under the prior act, Customs would decide on appropriate security, which was based on the value of the merchandise, not the amount of estimated duties. *See* Antidumping Act of 1921, Pub. L. No. 10, § 208, 42 Stat. 9, 14 (1921). In fact, no estimated duty amounts were listed on the original Treasury dumping findings. *See Television Receiving Sets, Monochrome and Color, From Japan,* 35 Fed. Reg. 18,549 (Dep't Treas. 1970) (determination of sales at less than fair value); *see also, Television Receiving Sets, Monochrome and Color, From Japan,* 36 Fed. Reg. 4597 (Dep't Treas. 1971) (dumping finding). Congress' concern with the lag between the issuance of the dumping finding and ultimate collection of dumping duties led to the change in the 1979 Act which required cash deposits and interest on overpayments and underpayments of dumping duties. *Timken,* 15 CIT at 530–32; 777 F. Supp. at 24–25; 19 U.S.C. § 1677g(a). On its face 19 U.S.C. § 1677g(a) applies to antidumping duties stemming from Treasury findings and Commerce orders. Because Commerce did not have information to allow it to calculate estimated antidumping duties under Treasury's findings, however, it allowed bonding to continue until it arrived at estimates in its review. *Antidumping, Treatment of Merchandise Subject to a Finding of Dumping in Effect on January 1, 1980,* 45 Fed. Reg. 1084 (Dep't Treas. 1980). Thus, there was no cash deposit requirement for anyone subject to only a Treasury finding without a Commerce determination. Cash deposits on any fair basis were virtually an impossibility. *See id.* Commerce's interpretation of 19 U.S.C. § 1677g(a) allowing it to delay interest accrual on duties stemming from dumping findings until a Commerce order was in place was upheld as a reasonable interpretation of the statute. *Timken,* 37 F.3d at 1477. In this case, however, unlike *Timken,* the Commerce review has been completed and cash deposit rates have been set. The amount of underpay-

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[4] Section 1673e(a) provides in relevant part:

> Within 7 days after being notified by the Commission of an affirmative determination * * *, the administering authority shall publish an antidumping duty order which— * * *
>
> (3) requires the deposit of estimated antidumping duties pending liquidation of entries of merchandise at the same time as estimated normal customs duties on that merchandise are deposited.

19 U.S.C. § 1673e(a)(3) (1988).

[5] Section 1673e(c)(1), Title 19, United States Code allows the posting of a bond or other security in lieu of the deposit of estimated antidumping duties as required by 19 U.S.C. § 1673e(a) for a 90 day period under certain conditions, *e.g.*, if the investigation has not been designated as extraordinarily complicated; the final determination in the investigation has not been postponed; a determination will be made within 90 days after the date of publication of an order; etc. *See* 19 U.S.C. § 1673e(c)(1) (1988).

ment or overpayment is easily determined and there is no reason for deferral of interest accrual.

There is much to defendant's argument that under plaintiff's view, which isolates the *Timken* discussion of entry under bond, someone with a deposit requirement of .06 percent would pay interest on duties later found owing, while the zero rate entrant would not, even if it owed much higher duties. There is not much purpose in rewarding the more deficient entrant. The court would also note that this scheme for interest collection or payment is consistent with 19 U.S.C. § 1505(c) (1994) which requires interest on underpayments and excess deposits of ordinary duties. *See also Travenol Lab., Inc. v. United States,* Slip Op. 96–114, at 4–5 (Ct. Int'l Trade July 23, 1996) (noting intent of Congress in amending 19 U.S.C. § 1505 to require interest on excess moneys deposited from date of deposit was to "provide equity in the collection and refund of duties and taxes, together with interest, by treating collections and refunds equally")(citation omitted).

Commerce's interpretation of the statute is reasonable and its distinguishment of *Timken* is appropriate. Until estimates were established by Commerce reviews of dumping findings cash deposits were not required for anyone and interest did not accrue. Per *Timken,* once a duty order issues from Commerce interest begins to accrue, even on duties which stem from an original Treasury dumping finding. 37 F.3d at 1477; 19 U.S.C. § 1677g(a). Whatever action Customs took or is permitted to take under the continuous entry bond originally issued to secure ordinary duties does not alter the interest requirement which arises after the duty order issues. The statute is intended to achieve a balance. If the government exacts too much, it must pay interest on the overage. If the importer pays too little, or nothing at all, it must pay interest on the shortfall.

Accordingly, summary judgment is granted for defendant.

(Slip Op. 96–122)

KOYO SEIKO CO., LTD. AND KOYO CORP. OF U.S.A., PLAINTIFFS *v.* UNITED STATES AND U.S. DEPARTMENT OF COMMERCE, DEFENDANTS, AND TIMKEN CO., DEFENDANT-INTERVENOR

Court No. 94–12–00779

Plaintiffs move pursuant to Rule 56.2 of the Rules of this Court for judgment on the agency record challenging certain aspects of the Department of Commerce, International Trade Administration's ("Commerce") final determination entitled *Tapered Roller Bearings, Four Inches or Less in Diameter, and Components Thereof, From Japan ("Final Results")*, 59 Fed. Reg. 56,035 (1994). Specifically, plaintiffs allege that the Final Results are flawed because Commerce improperly: (1) applied best information available ("BIA") to sample sales of Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. (collectively "Koyo"); (2) applied BIA to Koyo's discounts; and (3) compared components split from home market tapered roller bearing sets to cups and cones sold individually in the U.S. market.

Held: Plaintiffs' motion for judgment on the agency record is denied. Commerce's application of BIA to Koyo's sample sales and discounts, and Commerce's decision to apply its set-splitting methodology were supported by substantial evidence on the agency record and in accordance with law. This case is dismissed.

[Plaintiffs' motion denied and case dismissed.]

(Dated August 5, 1996)

Powell, Goldstein, Frazer & Murphy (Peter O. Suchman, Niall P. Meagher, Elizabeth C. Hafner and *Lee Ann Alexander)* for plaintiffs.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Velta A. Melnbrencis);* of counsel: *David W. Richardson,* Attorney-Advisor, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendants.

Stewart and Stewart (Terence P. Stewart, James R. Cannon, Jr. and *William A. Fennell)* for defendant-intervenor.

OPINION

TSOUCALAS, *Judge:* Plaintiffs, Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. (collectively "Koyo"), commenced this action challenging certain aspects of the Department of Commerce, International Trade Administration's ("Commerce" or "ITA") final determination of administrative reviews entitled *Tapered Roller Bearings, Four Inches or Less in Diameter, and Components Thereof, From Japan ("Final Results")*, 59 Fed. Reg. 56,035 (1994).

BACKGROUND

In 1980, Commerce began administering the antidumping law and initiated a number of administrative reviews covering outstanding antidumping determinations, including the finding on tapered roller bearings ("TRBs") from Japan issued on August 18, 1976. *See Tapered Roller Bearings and Certain Components From Japan,* 41 Fed. Reg. 34,974 (1976). The initiated reviews covered the period of 1980 through 1985.

In 1986, when the antidumping statute was amended to provide administrative reviews by request only, Commerce re-initiated incom-

plete reviews based on requests from interested parties. On July 9, 1986, Commerce re-initiated the reviews of Koyo's entries for the period of 1974 through 1985. *See Initiation of Antidumping Duty Administrative Reviews,* 51 Fed. Reg. 24,883 (1986). In 1989, in an attempt to dispose of a backlog of incomplete reviews of TRBs, Commerce divided the administrative proceedings for Koyo into two parts—one covering the 1974 through March, 1979 review periods, and the other covering the April, 1979 through July, 1985 review periods (later expanded to include the 1985–86 review periods).

On June 1, 1990, Commerce published the final results for the 1974 through March, 1979 review periods for Koyo. *See Tapered Roller Bearings Four Inches or Less in Outside Diameter From Japan; Final Results of Antidumping Duty Administrative Review,* 55 Fed. Reg. 22,369 (1990).

On May 13, 1991 Koyo resubmitted its data for the 1979–86 review periods to conform with Commerce's current computer format. P.R. Doc. No. 719, Fiche 16, Frame 1. On September 17, 1993, Commerce issued a supplemental questionnaire. P.R. Doc. No. 790, Fiche 41, Frames 66–71. Koyo responded to the supplemental questionnaire on November 1, 1993. P.R. Doc. No. 799, Fiche 42, Frame 1. Commerce published the final results for these reviews on November 24, 1994. *See Final Results,* 59 Fed. Reg. at 56,035.

Koyo brought this action pursuant to Rule 56.2 of the Rules of this Court for judgment upon the agency record claiming that the following actions by Commerce were unsupported by substantial evidence on the agency record and not in accordance with law: (1) applying best information available ("BIA") to sample sales; (2) applying BIA to discounts and allowances; and (3) comparing components split from home market tapered roller bearing sets to cups and cones sold individually in the U.S. market.[1] On January 18, 1993, this Court granted Koyo's consent application for a preliminary injunction suspending liquidation of entries of TRBs involved in the reviews at issue during the pendency of this litigation.

DISCUSSION

The Court's jurisdiction in this action is derived from 19 U.S.C. § 1516a(a)(2) (1994) and 28 U.S.C. § 1581(c) (1994).

The Court must uphold Commerce's final determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1994). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)). "It is not within the Court's domain either to weigh the adequate quality or quan-

[1] Plaintiffs abandoned three of the original six counts of their complaint. *See* Pls.' Mem. Supp. Mot. J. Agency R. at 1; Pls.' Reply to Opp'n to Pls.' Mot. J. Agency R. at 2.

tity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record." *Timken Co. v. United States*, 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988), *aff'd*, 894 F.2d 385 (Fed. Cir. 1990).

1. *Application of BIA to Sample Sales:*

In the Final Results at issue, Commerce resorted to BIA to determine the value of Koyo's U.S. sample sales. 59 Fed. Reg. at 56,049. Commerce explained its choice of BIA as follows:

> We only have information on Koyo's home market sample sales. Therefore, we used the data for home market sample sales from the 1985/86 period. We used the relationship of home market sample sales to total home market sales to represent the relationship of U.S. sample sales to total U.S. sales. With this information, we determined a value for those U.S. sample sales and applied a BIA margin to that value. We added both the resulting duties due amount and the calculated value of the sample U.S. sales to our respective margin and value totals in deriving our weighted-average margin.

59 Fed. Reg. at 56,049–50.

Koyo argues that Commerce's decision to apply BIA and its choice of BIA constituted an abuse of discretion. According to Koyo, it was unable to supply the information requested because Commerce did not request data regarding U.S. sample sales until September 17, 1993 which was fourteen years after the beginning of the first period of these reviews, and six years after the end of the final period. Koyo claims that it was unable to identify its U.S. sample sales after such a long period of time had passed since its original submission. Koyo explains that in order to comply with Commerce's request, it would have had to review manually all of its old U.S. invoices for the 1979–86 period which numbered in the tens of thousands. Pls.' Mem. Supp. Mot. J. Agency R. at 13–14.

Koyo further emphasizes that it was Commerce's failure to proceed with its investigation in a timely manner that resulted in Koyo's inability to provide the requested data. Relying on *Shikoku Chems. Corp. v. United States*, 16 CIT 382, 387, 795 F. Supp. 417, 421 (1992), Koyo maintains that Commerce improperly held Koyo responsible for Commerce's tardiness and repeated changes of methodology. Pls.' Mem. Supp. Mot. J. Agency R. at 16–17.

Commerce responds that Koyo, as an experienced importer/ exporter, has been on notice since 1981 that Commerce regards U.S. sample sales as covered by a dumping finding and that Commerce had a policy of treating sample sales in the same manner as other U.S. sales. Defs.' Opp'n to Pls.' Mot. J. Agency R. at 8–10. Commerce emphasizes that Koyo's failure to submit the requested data in its supplemental questionnaire response was a result of Koyo not wanting to review manually all of its sales invoices as opposed to Koyo not having the information. Defs.' Opp'n to Pls.' Mot. J. Agency R. at 10–11.

Commerce also defends its choice of BIA arguing that under the circumstances, in which Koyo submitted no information regarding its U.S. sample sales, Commerce properly assumed that the relationship between Koyo's home market sample sales from the 1985–86 period of review to total home market sales represented the relationship of U.S. sample sales to total U.S. sales. If this were not a reasonable assumption, Commerce asserts that Koyo would have provided Commerce with data on its U.S. sample sales. In addition, Commerce suggests that it could have assigned to the missing U.S. sample sales a zero price which would have resulted in a more adverse dumping margin. *Id.* at 11–13 (citing *J.C. Hallman Mfg. Co. v. United States*, 13 CIT 1073, 1076, 728 F. Supp. 751, 753 (1989)).

Defendant-intervenor The Timken Company ("Timken") supports Commerce's position on this issue arguing that Koyo failed to demonstrate that business records regarding U.S. sample sales did not exist or could not be reviewed within the time allowed. Timken contends that the fact that Koyo had the ability to review manually a large quantity of other sales data supports the conclusion that Koyo could have segregated sample sales in the course of its sales data review. According to Timken, Koyo's response to Commerce's request for information was tailored to exclude U.S. sales from the margin analysis. Def.-Int.'s Opp'n to Pls.' Mot. J. Agency R. at 12–14. Timken also agrees with Commerce's choice of BIA arguing that it was reasonable in light of Koyo's refusal to submit requested data. *Id.* at 15–16.

Section 1677e(c) of Title 19, United States Code (1988), states that Commerce "shall, *whenever a party* or any other person refuses *or is unable to produce information requested in a timely manner and in the form required,* or otherwise significantly impedes an investigation, use the best information otherwise available." (Emphasis added). In addition, Commerce's regulations instruct the Secretary to use BIA whenever Commerce:

> (1) *Does not receive a complete, accurate, and timely response to the Secretary's request for factual information;* or
> (2) Is unable to verify, within the time specified, the accuracy and completeness of the factual information submitted.

19 C.F.R. § 353.37(a) (1993) (emphasis added).

Courts have clearly acknowledged that the statute does not specifically restrict Commerce's ability to resort to BIA to situations in which the respondent is "able" to provide the requested information. *See Olympic Adhesives, Inc. v. United States*, 899 F.2d 1565, 1574 (1990) (holding that section 1677e(b) requires noncompliance with an information request before use of BIA is appropriate "whether due to refusal or mere inability"); *see also Koyo Seiko Co. v. United States*, 19 CIT ____, ____, 905 F. Supp. 1112, 1116–17 (1995) (holding that Koyo's inability to produce information in the possession of an uncooperative related party justified Commerce's resort to BIA). The language of the statute clearly directs Commerce to use BIA if the respondent "refuses

or is unable" to respond to a request for information. Similarly, the regulations direct Commerce to use BIA whenever it does not receive "complete" and "accurate" information. 19 C.F.R. § 353.37(a)(1).

There is no question that Koyo failed to provide Commerce with requested information. Koyo acknowledged its own failure to report the requested sample sales in its response to the supplemental questionnaire by stating the following:

> Koyo's previous submissions of sales data in this reviews [sic] did not include sample sales. The Department's methodology regarding sample sales has evolved considerably since this review began in 1979. In the early stages of this review, the Department's questionnaires issued to Koyo did not require the reporting of sample sales. Moreover, the Department has excluded sample sales from Koyo's margin analysis in TRB reviews covering periods subsequent to those under consideration in this review. Accordingly, Koyo did not report sample sales in this review.
>
> In accordance with the Department's request, Koyo has prepared a listing of home market sample sales during the periods covered by these reviews * * *.
>
> Because of the manner in which [Koyo] maintained its sales records during these periods of review, [Koyo] is unable to prepare a listing of U.S. sample sales for these periods. To produce such a listing, [Koyo] would have to review manually all of its sales invoices and records for the covered periods. Koyo has not been able to undertake this task in time to respond to this questionnaire, and thus cannot provide a listing of U.S. sample sales.

P.R. Doc. No. 799, Fiche 42, Frames 11–12.

Koyo's reliance on *Shikoku*, 16 CIT at 387, 795 F. Supp. at 421 to support its position is misplaced. In *Shikoku*, the court held that Commerce acted beyond its discretionary powers by changing its methodology for the fifth and sixth antidumping administrative reviews after using a different methodology for the first four, even though the new methodology was likely to be a slight improvement. 16 CIT at 388, 795 F. Supp. at 422. The court noted that "[a]t some point, Commerce must be bound by its prior actions so that parties have a chance to purge themselves of antidumping liabilities." *Id.* at 387, 795 F. Supp. at 421.

The facts of the present case are distinguishable from those of *Shikoku*. First of all, *Shikoku* involved a change in Commerce's method of allocation as opposed to the application of BIA. Second, the respondents in the reviews involved in *Shikoku* claimed that they relied on Commerce's prior methodology in preparing their responses to Commerce's requests for information. There was no evidence in *Shikoku* that the respondents had not provided Commerce with requested information. In the case at bar, Koyo specifically declined to respond to Commerce's supplemental questionnaire request for information regarding sample sales. Unlike *Shikoku*, this is not a situation in which a respondent provided Commerce with all of the requested information and Commerce suddenly changed its methodology.

Assuming Koyo's failure to report sample sales was in fact due to the impossibility of reviewing manually all of its U.S. sales at such a late point in the investigations, Koyo's inability to provide the information justified Commerce's use of BIA. The statute, accompanying regulation and case law compel this result. The next issue is whether Commerce's choice of BIA was appropriate considering the circumstance surrounding Koyo's inability to provide the sample sales data.

In *Allied-Signal Aerospace Co. v. United States,* 996 F.2d 1185, 1191 (Fed. Cir. 1993), the CAFC noted that "because Congress has 'explicitly left a gap for the agency to fill' in determining what constitutes the best information available, the ITA's construction of the statute must be accorded considerable deference" (quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843–44 (1984)). Furthermore, Commerce has interpreted BIA as a rule of adverse inference which establishes a presumption that the highest prior margins are the best information available. *Rhone Poulenc, Inc. v. United States,* 899 F.2d 1185, 1190–91 (Fed. Cir. 1990). In *Rhone Poulenc,* the Court of Appeals for the Federal Circuit ("CAFC") upheld Commerce's use of the highest prior margin as BIA stating the following:

> [I]t reflects a common sense inference that the highest prior margin is the most probative evidence of current margins because, if it were not so, the importer, knowing of the rule, would have produced *current* information showing the margin to be less. The agency's approach fairly places the burden of production on the importer, which has in its possession the information capable of rebutting the agency's inference.

899 F.2d at 1190.

In this case, Commerce selected the highest margin for any of the review periods at issue (1985–86 review period) and used the relationship between total home market sales and home market sample sales to determine the relationship between total U.S. sales and U.S. sample sales. The Court finds that this selection of BIA was not punitive and constituted a reasonable application of BIA. Presuming Koyo knew that BIA is a rule of adverse inference, it could have made some attempt to review manually the information necessary to rebut Commerce's presumption. Koyo was able to review a significant portion of other sales manually to conform to Commerce's new reporting requirements as demonstrated by the letter dated November 5, 1990, in which Koyo requested the opportunity to resubmit data to Commerce on computer tape which required key-punching. P.R. Doc. No. 711, Fiche 15, Frames 25–26. Koyo submitted the revised data on May 13, 1991 which was twelve years after the first period of these reviews, and four years after the end of the final period. *See* P.R. Doc. No. 719, Fiche 16, Frame 1. These submissions severely undermine Koyo's arguments concerning its alleged inability to review data manually at such a late point during the administrative reviews. The Court also notes that Commerce's choice of BIA was not completely adverse thereby taking into account

Commerce's responsibility for the numerous delays in completing the reviews. Commerce used the ratio of total home market sales to home market sample sales rather than the highest ratio of total home market sales to home market sample sales. Accordingly, the Court concludes that Commerce's selection of BIA was supported by substantial evidence on the agency record and in accordance with law.

2. *Use of BIA to Compute Discounts:*

In the Final Results Commerce resorted to BIA to compute Koyo's U.S. discounts because Koyo did not report the discounts on a transaction-specific basis. Commerce assigned as BIA "the highest percentage discount reported for any U.S. sale to all sales that received a discount during each POR [period of review]." 59 Fed. Reg. at 56,044.

Koyo contests the use of BIA for its U.S. discounts claiming that it was not Commerce's practice during the review periods to require Koyo to allocate discounts on a transaction-specific basis. Koyo maintains that until recently, Commerce had consistently accepted customer-specific discount factors in TRBs and antifriction bearings reviews. Koyo claims that it had no notice of Commerce's new practice of accepting only transaction-specific discount reporting until it received the supplemental questionnaire on September 17, 1993. Koyo insists that it could not report transaction-specific discounts because of the manner in which it had maintained its records during the 1979–86 review periods. According to Koyo, the use of BIA punished Koyo for Commerce's own excessive delays in completing the reviews. Pls.' Mem. Supp. Mot. J. Agency R. at 18–23.

Koyo further maintains that even if the application of some form of BIA was appropriate, Commerce should not have used such adverse BIA. Koyo contends that neutral BIA would have been more appropriate in light of Commerce's failure to complete these reviews in a timely manner. Pls.' Mem. Supp. Mot. J. Agency R. at 23–24.

In response, Commerce argues that it properly resorted to BIA after Koyo failed to respond adequately to an information request. Commerce asserts that it gave Koyo the choice to report discounts on a transaction-specific or customer-specific basis and Koyo did not comply with either option. Commerce explains that Koyo provided Commerce with average discount rates for the review periods in question. Commerce further contends that accuracy in calculating the proper dumping margins demanded that discounts be reported on a specific basis. Defs.' Opp'n to Pls.' Mot. J. Agency R. at 14–18.

Commerce also defends its choice of BIA emphasizing that Koyo did not report accurate discount information and, therefore, Commerce did not reject low margin information in favor of high margin information that was demonstrably less probative of current conditions. Commerce also insists that the highest discount figures used by Commerce were very close to the figures supplied by Koyo. *Id.* at 18–19.

Defendant-intervenor Timken supports Commerce's position on this issue. Def.-Int.'s Opp'n to Pls.' Mot. J. Agency R. at 19–24.

On May 13, 1991, Koyo submitted revised data explaining its method of reporting discounts as follows:

> Koyo calculated adjustments for discounts based upon its income statements for each year of the POR because the discount programs always applied to a variety of products, including but not limited to the subject merchandise. For this POR, [Koyo] does not have computerized customer-by-customer data for either discounts or allowances. Therefore, Koyo calculated a combined discount and allowance factor for each year because these expenses are reported as one expense on [Koyo's] income statements. The combined discount/allowance factor was calculated by dividing the total discounts and allowances actually granted during the review period by the total value of sales during that review period. This factor was then multiplied by the per-unit sales price for each sale to derive the expense that is reported on the computer tape.

P.R. Doc. No. 719, Fiche 16, at C–9. In the supplemental questionnaire dated September 17, 1993, Commerce requested Koyo to "provide documentation of the discount rates in effect during each of the review periods and report this item on a transaction-specific basis" and "[i]f this is not possible, provide customer-specific discount rates." P.R. Doc. No. 790, Fiche 41, Frame 70. In its submission on November 1, 1993, Koyo responded to this request as follows:

> Because of the manner in which it maintained its sales records during the periods covered by this review, [Koyo] does not have the data necessary to report its discounts either on a transaction-specific basis or on a customer-specific basis.
>
> [Koyo] reported its discounts based on an allocation of its total discounts from its financial statements over its total sales for each period. While [Koyo] now maintains a computer record of the discount rates in effect from time to time for each customer, [Koyo] did not maintain any such records during the 1979/86 period. Accordingly, [Koyo] does not have a complete listing of discount rates for AM customers for the 1979/86 period.

P.R. Doc. No. 799, Fiche 42, Frames 23–24.

Once again, Koyo failed to provide Commerce with information in the manner requested. Commerce requested that the discounts be reported on either a transaction– or customer-specific basis. The application of BIA is appropriate when a respondent does not provide information "in the form required." 19 U.S.C. § 1677e(c). Koyo clearly failed to report its U.S. discounts in the form required by Commerce.

Further, in a previous case involving Koyo, this Court rejected an argument similar to the one presented here. *See Koyo Seiko*, 19 CIT at ____, 905 F. Supp. at 1119–20. In *Koyo Seiko*, this Court found that Commerce properly resorted to BIA when Koyo failed to respond accurately to a deficiency letter by not reporting discounts on a transaction-specific basis. In that case, Koyo reported the discounts on a customer-specific basis stating that it would have been too burdensome to conduct a manual review of transaction-specific data in the short time frame per-

mitted. The Court found this reasoning unpersuasive considering that Commerce had announced its intentions to require transaction-specific reporting of discounts in 1992 in the final results of an antifriction bearings administrative review involving Koyo. *Id.* (citing *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; et al.; Final Results of Antidumping Duty Administrative Reviews,* 57 Fed. Reg. 28,360, 28,400 (1992)). While the antifriction bearings reviews occurred after Koyo's submission in May, 1991, Commerce had been accepting customer-specific reporting before 1991. The new methodology announced in 1992 concerned Commerce's intention to accept only transaction-specific reporting. Customer-specific reporting was not a new methodology in 1991 when Koyo submitted its revised data. In fact, Commerce had been consistently accepting customer-specific reporting in the antifriction bearings reviews in which Koyo was a respondent before 1991. *See Final Determinations of Sales at Less than Fair Value: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany,* 54 Fed. Reg. 18,992, 19,055–56 (1989); *Final Determinations of Sales at Less Than Fair Value; Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Japan,* 54 Fed. Reg. 19,101, 19,106 (1989). Thus, Koyo's claim in the present case that it had no knowledge of Commerce's new reporting requirements until 1993 when it received the supplemental questionnaire seems insincere at best.

In addition, Koyo actually had the choice to report the discounts on a transaction- or customer-specific basis. Koyo chose to rely on a third methodology and, therefore, did not respond completely and accurately to Commerce's request for information. As such, Commerce was justified in applying BIA to Koyo's discount sales.

The Court also sustains Commerce's choice of BIA. As the Court noted earlier, Commerce is granted considerable deference in its selection of BIA. *See supra* at 11. In *Koyo Seiko,* Commerce used as BIA the highest customer-specific rate reported by Koyo for any customer receiving discounts. The Court found this choice of BIA to be consistent with law since it was based on information in Koyo's most recent responses. Similarly, in the case at bar, Commerce applied as BIA the highest percentage discount reported for any U.S. sale to all sales that received a discount during each period of review. Commerce used Koyo's own reported information for the periods of review covered in these administrative reviews. While it is true that this case involved excessive delays that were not present in *Koyo Seiko,* Commerce was also more flexible in its reporting requirements since it gave Koyo the choice to report the information on a transaction- or customer-specific basis. Koyo's decision to report its discounts based upon a completely different methodology supported Commerce's use of an adverse BIA.

3. *Set-Splitting Methodology:*

In these administrative reviews, Commerce split TRB sets in the home market into sales of individual cups and cones for the purpose of

establishing foreign market value ("FMV"). 59 Fed. Reg. at 56,040. Conceding that the Court of Appeals has affirmed a decision of this Court upholding Commerce's set-splitting methodology, Koyo asserts that the facts of this case are distinguishable because in these administrative reviews Commerce used annual averages to compute FMV as opposed to monthly averages. According to Koyo, there were sufficient sales of particular cups and cones spread over each period of review to provide Commerce with a basis for FMV without splitting sets. Koyo also contends that the underlying rationales for permitting Commerce to split sets are not applicable to the facts of this case. Pls.' Mem. Supp. Mot. J. Agency R. at 24–28.

Commerce responds that the facts of this case do not significantly differ from those cases in which the Court upheld Commerce's methodology. Defs.' Opp'n to Pls.' Mot. J. Agency R. at 20–21 (citing *NTN Bearing Corp. of Am. v. United States*, 17 CIT 1149, 1152, 835 F. Supp. 646, 649 (1993), *remanded on other grounds*, 18 CIT ___, 843 F. Supp. 737 (1994), *aff'd without opinion*, 41 F.3d 1519 (Fed. Cir. 1994)). Commerce states that in *NTN*, Commerce calculated FMV for each Koyo TRB model by using the weighted-average price over the entire period of review (March 27, 1987 through September 30, 1988). Commerce further argues that accepting Koyo's approach would allow importers to tailor their invoicing methods to circumvent the antidumping laws. Defs.' Opp'n to Pls.' Mot. J. Agency R. at 20–22.

In rebuttal, Koyo points out that in *NTN*, Commerce used annual averages with respect to Koyo and not NTN. Therefore, Koyo argues, this Court did not address in *NTN* the specific issue raised in this case. Pls.' Reply to Opp'n to Pls.' Mot. J. Agency R. at 9–10.

After citing the opinions of the Court pertaining to set-splitting and the underlying rationales for using this methodology, Commerce stated the following with respect to its decision to split sets in these reviews:

> The Department considers set-splitting to be necessary for these reviews; cups and cones split from sets are potentially the most similar merchandise to the products sold in the United States. Because they may be the most similar products, it is appropriate to include this merchandise in the pool of home-market sales.

59 Fed. Reg. at 56,040.

Commerce's practice of splitting sets to calculate FMV has been consistently upheld by this Court. *See NTN Bearing Corp. of Am. v. United States*, 20 CIT ___, ___, 924 F. Supp. 200, 205–06 (1996), *appeal docketed*, No. 96–1436 (Fed. Cir. July 2, 1996); *NTN Bearing Corp. of Am. v. United States*, 18 CIT ___, ___, 881 F. Supp. 584, 590 (1994); *NTN Bearing*, 17 CIT at 1152, 835 F. Supp. at 649. In none of these cases did the Court limit the application of the set-splitting methodology to those situations in which Commerce relies on monthly averages to compute FMV. In finding Commerce's methodology to be consistent with law, the Court has noted that the practice of splitting sets discourages circumvention of the antidumping statute. In the absence of set-splitting, a

respondent may compel the use of constructed value by selling sets in one market and single cups and cones in another. The use of annual averages does not alleviate this concern. Koyo's contention that there is no evidence of an attempt by Koyo to circumvent the law in this case is irrelevant. In the cases upholding Commerce's methodology, this Court has never based its decision on facts supporting a finding that the respondents involved in the administrative reviews were actually attempting to avoid the application of the antidumping statute. In *NTN*, 18 CIT at , 881 F. Supp. at 590, the Court was concerned that NTN "*could have* compelled the use of constructed value." (Emphasis added). There was no evidence that NTN had actually attempted to manipulate the results of the antidumping duty reviews. Thus, Commerce did not need to demonstrate that Koyo intended to force Commerce to use constructed value before resorting to the set-splitting methodology.

Furthermore, Commerce explained in the Final Results that set-splitting was appropriate because this method would produce the most similar comparison of merchandise. This goal is reasonable and consistent with the statute. Accordingly, the Court sustains Commerce on this issue.

CONCLUSION

In accordance with the foregoing opinion, this Court, after due deliberation and a review of all papers in this action, finds that Commerce's actions were in accordance with law and supported by substantial evidence. For the reasons stated above, the Final Results are affirmed and plaintiffs' motion is denied in all respects. This case is dismissed.

NOTE: This is to advise that Slip Op. 96–123 is not available for publication at this time due to the confidential nature of the document. A public version of the document will be released and published in the CUSTOMS BULLETIN when available.

(Slip Op. 96–123)

UNION CAMP CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND DASTECH INTERNATIONAL, INC., ET AL., DEFENDANT-INTERVENORS

Court No. 94–08–00480

(Dated August 5, 1996)

(Slip Op. 96–124)

NTN BEARING CORP. OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORP., AND NTN CORP., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND TORRINGTON CO., FEDERAL-MOGUL CORP., DEFENDANT-INTERVENORS

Court No. 91–08–00577

(Dated August 5, 1996)

JUDGMENT

TSOUCALAS, *Judge:* This case concerns the United States Department of Commerce, International Trade Administration's ("Commerce") final results of redetermination on remand filed pursuant to *NTN Bearing Corp. of Am. v. United States,* 20 CIT ____, Slip Op. 96–69 (1996) *(NTN III).*

On April 19, 1996, the Court remanded to Commerce the final results of administrative review of the antidumping duty order on antifriction bearings (other than tapered roller bearings) and parts thereof from Japan, produced by NTN Corporation and distributed by its subsidiary NTN Bearing Corporation of America (collectively "NTN"). *See NTN III,* 20 CIT at ____, Slip Op. 96–69. On June 17, 1996, in compliance with this Court's remand order, Commerce filed its *Final Results of Redetermination Pursuant to Court Remand, NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation, and NTN Corporation v. United States,* Slip Op. 96–69 (April 19, 1996) *("Remand Results").* The Remand Results concern *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from Japan: Final Results of Antidumping Duty Administrative Reviews ("Final Results"),* 56 Fed. Reg. 31,754 (July 11, 1991).

In *NTN III,* in accordance with the December 11, 1995 decision and February 5, 1996 mandate of the United States Court of Appeals for the Federal Circuit ("CAFC"), Appeal No. 94–1186, this Court ordered Commerce to consider whether information submitted by NTN supports its allegation that the submitted data contains two types of clerical errors and, if such errors exist, to correct them. *NTN III,* 20 CIT at ____, Slip Op. 96–69. These errors were alleged to exist in the U.S. sales database for ball bearings and concerned exporter's sales price ("ESP") transactions. One of the alleged errors involved inadvertent inclusion of four Canadian sales transactions. The second alleged error concerned assignment of incorrect precision codes to five part numbers sold to a U.S. customer. *NTN Bearing Corp. of Am. v. United States,* 17 CIT 713, 715, 826 F. Supp. 1435, 1437–38 (1993), *aff'd in part, rev'd in part,* 74 F.3d 1204 (Fed. Cir. 1995).

Based on its analysis and comments to its draft Remand Results received from the parties to this proceeding, Commerce determined that NTN's allegations are supported in the record. Therefore, Commerce

corrected the error relating to Canadian sales by removing the four transactions in question from NTN's ESP database and excluding those sales from its analysis and calculations. Commerce also corrected NTN's precision code clerical error by assigning, within the final Remand Results computer program, the proper family code to the five models in question. *Remand Results* at 5–11.

In addition, for this redetermination, Commerce relied on the final results computer program pursuant to *NTN Corp.*, 17 CIT at 713, 826 F. Supp. at 1435, which contained the appropriate, tax-neutral value-added tax calculation methodology, and modified it— incorporating pre-sale inland freight computer programming language developed pursuant to *Federal-Mogul v. United States*, 18 CIT ____, Slip Op. 94–40 (Mar. 7, 1994) which also concerned NTN's 1988–90 Final Results of administrative review. *Id.* at 12–13.

The final Remand Results recalculated a dumping margin for NTN of 2.45% for ball bearings for the November 9, 1988 through April 30, 1990 review period. *Id.* at 13.

Commerce having complied with this Court's remand order, it is

ORDERED that the Remand Results are affirmed, and it is further

ORDERED that, since all other issues have been decided, this case is dismissed.

(Slip Op. 96–125)

NSK LTD. AND NSK CORP, PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND FEDERAL-MOGUL CORP. AND TORRINGTON CO., DEFENDANT-INTERVENORS

Court No. 93–08–00469

(Dated August 5, 1996)

JUDGMENT

TSOUCALAS, *Judge:* This case concerns the United States Department of Commerce, International Trade Administration's ("Commerce") final results of redetermination on remand filed pursuant to *NSK Ltd. v. United States*, 19 CIT ____, 910 F. Supp. 663 (1995).

In an underlying action, plaintiffs, NSK Ltd. and NSK Corporation (collectively "NSK"), challenged certain aspects of the final results of administrative review entitled *Final Results of Antidumping Duty Administrative Reviews and Revocation in Part of an Antidumping Duty Order ("Final Results")*, 58 Fed. Reg. 39,729 (July 26, 1993). On November 14, 1995, the Court remanded to Commerce the Final Results of Commerce's third administrative review of antifriction bearings (other than tapered roller bearings) and parts thereof from Japan. *See NSK*, 19 CIT at ____, 910 F. Supp. at 663. On May 3, 1996, in com-

pliance with this Court's remand order, Commerce filed its *Final Results of Redetermination Pursuant to Court Remand, NSK Ltd and NSK Corporation v. United States,* Slip Op. 95–178 (November 14, 1995) *("Remand Results").*

In *NSK,* the Court remanded to Commerce the Final Results for the period May 1, 1991 through April 30, 1992 with regard to NSK. The Court ordered Commerce to eliminate use of best information available and (1) calculate the constructed value ("CV") for all finished bearings purchased from related suppliers based on data submitted by NSK; (2) calculate the CV for all bearings further manufactured in the United States from parts purchased by NSK exclusively from unrelated suppliers. In addition, the Court ordered Commerce to (3) correct a clerical error to reflect that the ending date of the sample week beginning on July 1, 1991 is July 7, 1991 rather than July 7, 1910; and (4) correct a clerical error which resulted in the failure to produce family matches. *NSK,* 19 CIT at ____, 910 F. Supp. at 678.

In accordance with the Court's order, Commerce (1) calculated the CV for all finished bearings purchased from related suppliers based on data submitted by NSK in this review; (2) calculated the CV for all bearings further manufactured in the United States with parts purchased exclusively from unrelated suppliers; (3) corrected the computer program to reflect the proper ending date for the sample week beginning July 1, 1991; and (4) corrected the computer program to produce family matches. Accordingly, NSK's recalculated final weighted-average dumping margins are 18.05% for ball bearings and 27.21% for cylindrical bearings for the period May 1, 1991 through April 30, 1992. *Remand Results* at 4.

Commerce having complied with this Court's remand order, it is

ORDERED that the Remand Results are affirmed, and it is further

ORDERED that, since all other issues have been decided, this case is dismissed.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C96/70 7/25/96 Goldberg, J.	Lenox Collections, a division of Lenox, Incorporated	91–10–00738, 92–05–00323	6911.10.80, 6911.10.50 Depending on the date of entry 26%	6913.10.50 9%	Lenox Collections *v.* United States CIT slip Op. 96–30 (Feb. 2, 1996)	Philadelphia, Newark, New York Ornamental porcelain spice jars
C96/71 7/25/96 Newman, J.	Memorex Telex Distribution NV	92–07–00478	8517.82.0080–3 4.7%	8471.99.1500–8 Duty free	Agreed statement of facts	San Francisco Ringnodes AT Token Rings and MC Token Rings
C96/72 7/25/96 Aquilino, J.	Timex Corporation	88–06–00425, 90–04–00216, 90–04–00217, 90–07–00362, etc.	720.24, 720.25, 720.28, 720.29, 740.35 Various rates	TSUS not stated $410,264.56 plus interest through March 31, 1996 $138,996.66 for a total of $549,261.22 + interest $549,261.22 from April 1, 1996 through the date of payment	Agreed statement of facts	Bridgeport, JFK Int'l Hartford Bezelband and caseband assemblies
C96/73 7/26/96 Newman, J.	Memorex Telex Corporation	92–07–00477	8517.82.0080–3 4.7% 8417.99.15	8471.99.1500–8 Duty free	Agreed statement of facts	Dallas/Ft. Worth AT Token Rings
C96/74 7/29/96 Newman, J.	Betty Ann American Sales Corp.	94–06–00342	6505.90.60 39.7¢/kg plus 14.1%	6505.90.50 7.2%	Agreed statement of facts	Miami Children's headwear of style numbers 0615 and 0633

ABSTRACTED VALUATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	VALUATION	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
V96/2 7/29/96 Goldberg, J.	Merck Sharp & Dohme Int'l	86–12–01605, 87–02–00318, 87–11–01123, 88–07–00571	Transaction value	Invoices plus value of indomethacin assists and capsule assists together with related freight charges and handling costs for shipments net packed	Merck Sharp & Dohme Int'l *v.* United States Slip Op. 96–20, (January 19, 1996), Court No. 89–01–00034	JFK Indocin SR

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